PROCEEDINGS AND ORDERS DATE: [04/12/95]

CASE NBR: [94108262] CSH STATUS: [DECIDED]
SHORT TITLE: [Lackey, Clarence Allen]
VERSUS [Texas] DATE DOCKETED: [030195]
*** CAPITAL CASE *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Mar 1 1995	G	Application (A94-643) for a stay of execution pending the disposition of a petition for a writ of certiorari, submitted to Justice Scalia.
2	Mar 1 1995	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Mar 2 1995	X	Supplemental brief of petitioner filed.
5	Mar 2 1995		Application (A94-643) referred to the Court by Justice Scalia.
6	Mar 2 1995		Brief of respondent in opposition and oppposition to application for stay of execution filed.
8	Mar 2 1995		Brief amici curiae of Bar of England and Wales Human Rights Committee filed.
7	Mar 3 1995		Application (A94-643) granted by the Court.
9	Mar 9 1995		DISTRIBUTED. March 24, 1995 (Page 13)
11	Mar 27 1995		Petition DENIED. Opinion by Justice Stevens respecting

PREVIOUS 1 1 EXIT

Last page of docket
SHDKT

PROCEEDINGS AND ORDERS DATE: [04/12/95]

CASE NBR: [94108262] CSH STATUS: [DECIDED]
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	DATE	NOTE	PROCEEDINGS & ORDERS
11	Mar 27 1995		Petition DENIED. Opinion by Justice Stevens respecting the denial of certiorari. Justice Breyer agrees with Justice Stevens about the importance of the issue. (Detached opinion.)

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No. 94-8262

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

Supreme Court, U.S.
FILED
1995
OFFICE OF THE CLERK

CLARENCE ALLEN LACKEY

Petitioner,

v.

STATE OF TEXAS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

THIS IS A CAPITAL CASE:
MR. LACKEY IS CURRENTLY SCHEDULED TO BE EXECUTED ON MARCH 6, 1995, SHORTLY AFTER 12:01 a.m.

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QUESTION PRESENTED

Petitioner was indicted for capital murder in mid-1977. As a result of two mandatory appeals in state court, Texas did not obtain a final conviction and schedule Petitioner's execution until *fifteen years later*. Since that point, in mid-1992, Petitioner has expeditiously pursued state and federal habeas corpus proceedings; over that same span, the state courts have issued four death warrants for Petitioner.

Under English common law, the execution of a death sentence under such circumstances would constitute cruel and unusual punishment. *See Riley v. Attorney General of Jamaica*, 1 AC 719, 3 All ER 469 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman) (arguing that "execution after inordinate delay would [infringe] the prohibition against cruel and unusual punishment [in] Section 10 of the Bill of Rights of 1689...."), *majority opinion overruled by Pratt & Morgan v. Attorney General of Jamaica*, 2 AC 1, 4 All ER 769 (Privy Council 1993) (*en banc*); *see also Pratt & Morgan*.

Given these circumstances, this petition presents the following question:

Whether the execution of a death sentence constitutes cruel and unusual punishment under the Eighth Amendment as intended by the Framers if, as a result of inordinate delay not attributable to his own conduct, the condemned is forced to endure nearly two decades on death row, during which time his execution is repeatedly rescheduled.

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CLARENCE ALLEN LACKEY,

Petitioner,

v.

STATE OF TEXAS

Respondent.

Petitioner Clarence Lackey prays that this Honorable Court issue a Writ of Certiorari to review the judgment of the Texas Court of Criminal Appeals in his case.

CITATION TO OPINION BELOW

Copies of the order of both the Texas Court of Criminal Appeals and the state habeas trial court denying habeas corpus relief will be forwarded to this Court as soon as they are issued. They are unavailable as of the time that this petition is being lodged with the Court.

JURISDICTION

Mr. Lackey invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues raised in this petition implicate the "cruel and unusual punishments" clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States

Constitution. Those provisions read in pertinent part as follows:

U.S. CONST.

Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*"

Amendment XIV

"... [N]or shall any State deprive any person of life, liberty, or property, without due process of law ... "

STATEMENT OF THE CASE

The State of Texas alleged by indictment that Mr. Lackey committed the capital murder of Diane Kumph on or around July 31, 1977. Mr. Lackey was arrested immediately thereafter and charged with capital murder; he has remained in custody during the ensuing eighteen years.

Mr. Lackey was originally tried in the 238th District Court of Midland County, Texas, on a change of venue from Lubbock County in the spring of 1978. At that trial, he was convicted of capital murder and sentenced to death. His case was then pending on an automatic direct appeal[1] to the Texas Court of Criminal Appeals for over four years. On September 15, 1982, that court reversed Petitioner's conviction and sentence on the authority of

[1] The post-Furman Texas capital sentencing statute provides for a mandatory, automatic direct appeal to the Texas Court of Criminal Appeals. See TEX. CODE CRIM. PRO. Art. 37.071(f) (Vernon 1974).

Adams v. Texas, 448 U.S. 38 (1980). Lackey v. State, 638 S.W.2d 439, 471-76 (Tex.Crim.App. 1982).

The case was remanded to the trial court, and Mr. Lackey was retried. He was again convicted of capital murder and sentenced to death in April 1983. Another automatic appeal to the Court of Criminal Appeals ensued. After deliberating over Mr. Lackey's second direct appeal for a total of eight years, the Court of Criminal Appeals -- with four judges dissenting -- ultimately affirmed Mr. Lackey's conviction and sentence both on original submission and on rehearing. See Lackey v. State, 819 S.W.2d 111 (Tex.Crim.App. 1989); id. at 128-41 (Tex.Crim.App. 1991) (on rehearing). Because no petition for certiorari was filed, Mr. Lackey's conviction and sentence became final ninety-days thereafter in August 1991, when the time for filing a certiorari petition passed.[2] Thus, it took the State of Texas from mid-1977 until mid-1991 -- *a period of fourteen years from the time of Mr. Lackey's arrest* -- to secure a final conviction in Mr. Lackey's case.[3] The state trial court subsequently

[2] In Penry v. Lynaugh, 492 U.S. 302 (1989), this Court defined "finality" as being the date of the denial of a direct appeal certiorari petition or, if no certiorari petition is filed, 90 days from the date that final judgment is entered by the state appellate court on direct appeal.

[3] On federal habeas corpus review, the district court was highly critical of the unusually protracted nature of the state court proceedings. See Lackey v. Collins, No. MO-92-CA-181, *memorandum order and opinion*, at 4 n.1 (W.D. Tex. June 11, 1993) (noting that it took 16 years for the case to go from Lackey's arrest to federal habeas corpus review). As discussed infra, such criticism is appropriately directed at the Texas courts -- and not Petitioner -- since fourteen of those sixteen years were

(continued...)

scheduled Mr. Lackey's first execution date to occur on July 17, 1992 -- 15 years from the date of the capital murder.

Only from that point in 1992, when Mr. Lackey filed his first discretionary habeas corpus appeal and sought a stay of execution, can it be said that he was in any way "responsible" for any subsequent delay. From 1992 until January 1995 -- a period of less than three years -- Mr. Lackey litigated his state and federal habeas corpus appeals. See Ex Parte Lackey, Writ No. 24,267-01 (Tex.Crim.App. Dec. 16, 1992), cert. denied Lackey v. Texas, 113 S. Ct. 1319 (1993); Lackey v. Collins, *memorandum opinion and order*, No. MO-92-181 (W.D. Tex. June 11, 1993), aff'd Lackey v. Scott, 28 F.3d 486 (5th Cir. 1994), cert. denied, 115 S. Ct. 743 (Jan. 9, 1995).[4]

While Mr. Lackey litigated his state habeas corpus appeals

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[3](...continued)
spent on criminal proceedings that were non-discretionary in terms of Mr. Lackey's wishes.

[4] The many claims raised on habeas review -- including various challenges to the capital sentencing instructions at trial -- involved quite substantial issues. Indeed, four members of the Texas Court of Criminal Appeals believed that one or more of those claims entitled Mr. Lackey to a new trial. See Lackey v. State, 819 S.W.2d 111, 122-23 (Tex.Crim.App. 1991) (Clinton, J., dissenting); id. at 128 (Miller, J., dissenting); id. at 136-39 (Clinton, J., dissenting from denial of appellant's motion for rehearing, joined by Maloney, J.); id. at 139-41 (Baird, J., dissenting from denial of appellant's motion for rehearing). In addition, the federal district court felt compelled to conduct an evidentiary hearing, see Lackey v. Collins, No. MO-92-CA-181, *memorandum opinion and order*, at 1 (W.D. Tex. June 11, 1993), which is further evidence of the substantial nature of the claims raised on habeas review. See Mann v. Scott, 41 F.3d 968, 985 n. 13 (5th Cir. 1994) ("[T]he holding of an evidentiary hearing is the exception, not the rule. In 1988, for example, only 1.11 percent of all [federal] habeas petitions obtained a full evidentiary hearing.") (citation omitted).

in 1992, the state courts set three separate execution dates -- the first for July 17, 1992; the second for October 17, 1992; and the third for December 17, 1992. See Lackey v. Collins, supra, *memorandum opinion and order*, at 3. The first two dates were stayed by the state trial court. The third execution date was stayed by the federal district court late in the day on December 16, 1992, within hours of the execution scheduled to occur on December 17th at 12:01 a.m. A fourth execution date was scheduled shortly after this Court denied Mr. Lackey's federal habeas certiorari petition on January 9, 1995. That execution date is presently pending.

Both the sheer length of time Clarence Lackey has spent on Texas' death row, nearly two decades, and the repeated execution dates that have been scheduled in this case have caused him a tremendous amount of psychological anguish and pain. The sustained stress and anxiety that Mr. Lackey has been subjected to while on death row -- *to date, waiting nearly as much time to die as he had spent on the earth at the time that he was arrested on capital murder charges in 1977*[5] -- have taken an extreme toll on Mr. Lackey's spiritual well-being and mental health. See *Affidavit of Clarence Lackey* (**Appendix A**); *Affidavit of Josette Tilling* (**Appendix B**). As Mr. Lackey has stated in a recent affidavit:

> 4. The many years that I have spent on death row have been filled with severe stress, depression, and

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[5] Mr. Lackey was 22 years old when he was arrested.

anxiety. The experience of the third execution date was the most traumatic for me. I came within a matter of hours of being executed before that third execution date was stayed by a federal court. After the third date was stayed, I became very ill -- emotionally and physically -- as a result of that traumatic experience.

5. Being on death row so long has been an emotional roller coaster for me. There have been times when I've had great hope that I would win a new trial or have my death sentence commuted. But there have also been countless times when I have believed that the State was actually going to kill me. Preparing for death is a draining experience, both emotionally and spiritually. It should be something that a person has to do only once in a lifetime. I have had to do that many times since being on death row during these many years. I've also had to watch my loved ones experience similar pain.

6. Death row is one of the loneliest, most miserable places on the earth. It is not only miserable because you know the state is planning on killing you, but also because you see the state killing other human beings around you. There have been approximately 90 executions in Texas since I've been here. My inmate identification number is 591. The guys that they're bringing to death row now have their inmate identification numbers in the 1100s. A lot of time has passed, almost two decades, since I've been here. I was a young man when I was arrested. Now I'm approaching my middle aged years.

7. There have been countless times that I have been unable to eat or sleep because of the never-ending stress that I have felt during my lengthy time on death row. Depression and anxiety always follows you around. You never seem to be able to escape it here. I regularly have had nightmares. I have them almost every night when I have had an execution date pending.

Appendix A, ¶¶ 4-7.

REASONS WHY CERTIORARI SHOULD BE GRANTED

THE EXECUTION OF A DEATH SENTENCE AFTER KEEPING THE CONDEMNED ON DEATH ROW FOR ALMOST TWO DECADES -- DURING WHICH TIME REPEATED, UNNECESSARY EXECUTION DATES WERE SCHEDULED -- PARTICULARLY WHEN THE DELAY IS LARGELY ATTRIBUTABLE TO THE STATE RATHER THAN THE INMATE -- CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

* *"Wasn't the real delay here much before the [habeas corpus appeal]? ... What accounts for that length of time just on ... the direct appeal [which] took so long -- 3 years. ... Well, I must say that that's -- it's hard to expect Federal judges or any judges to get excited about staying a Texas execution when Texas itself diddles arcund for 3 or 4 years ... If you want us to get serious, you should get serious yourselves."*[6]

* *"There is an instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long, extended period of time."*[7]

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[6] Remarks of Justice Scalia to Margaret P. Griffey, assistant attorney general of Texas, during oral arguments in McFarland v. Scott, No. 93-6497 (March 29, 1994), quoted in *Official Transcript [of] Proceedings before the Supreme Court of the United States*, McFarland v. Scott, at pp. 35-37 (Anderson Reporting Co.).

[7] Pratt & Morgan v. Attorney General of Jamaica, Privy Council Appeal No. 10 of 1993, slip op., at 16, *reported at* 3 WLR 995, 143 NLJ 1629, 2 AC 1, 4 All ER 769 (British Privy Council Nov. 2, 1993) (*en banc*) (available on LEXIS). A copy of the slip opinion in Pratt & Morgan is attached hereto as **Appendix C.**

* *"[T]here is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishment to be found in Section 10 of the Bill of Rights of 1689...."*[8]

A. Introduction

The execution of a prisoner pursuant to a constitutionally-obtained judgment is not cruel and unusual punishment *per se* under the Eighth and Fourteenth Amendments to the United States Constitution. See, e.g., Jurek v. Texas, 428 U.S. 262 (1976). However, it has long been recognized that while the death penalty itself may not be a cruel and unusual punishment, *the manner of its imposition* may violate the Eighth Amendment depending on the circumstances.

Because of the unusual circumstances surrounding the State's attempt to implement capital punishment in this case, the State of Texas has forfeited its right to execute Clarence Lackey under the Eighth and Fourteenth Amendments. This forfeiture has resulted both from the inordinate amount of time that Mr. Lackey has spent on Texas' death row and the States' *unnecessary* setting of repeated execution dates in this case.[9] Largely the result of

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[8] Riley v. Attorney General of Jamaica, 1 AC 719, 3 All ER 469 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman), majority opinion overruled by Pratt & Morgan v. Attorney General of Jamaica, 2 AC 1, 4 All ER 769 (Privy Council 1993) (*en banc*).

[9] The first three execution dates scheduled in this case were set by the Texas trial court solely in order to force Mr. Lackey to initiate his habeas corpus appeals in state and federal court. It is widely understood by members of the bench and bar in Texas -- although not understood by death row inmates facing such execution dates -- that in the overwhelming majority of (continued...)

unnecessary delays by the Texas courts in hearing Mr. Lackey's two mandatory, automatic direct appeals, Mr. Lackey has been required to spend almost two decades on death row. Had Mr. Lackey been sentenced to "life" imprisonment at trial -- which was the only alternative to the death penalty upon a conviction of capital murder -- he would have been eligible for parole in mid-1987.[10]

As explained above, Mr. Lackey's death sentence was originally imposed in 1978 following his 1977 arrest. The Texas Court of Criminal Appeals took over four years to render a

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[9](...continued)
Texas capital cases, such premature execution dates will not result in an actual execution. Judge Edith Jones of the U.S. Court of Appeals for the Fifth Circuit has noted this largely peculiar Texas practice of setting premature execution dates solely to force the immediate filing of habeas corpus appeals by death row inmates. See Hon. Edith Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 TEX. BAR J. 850, 851 (1990) (referring to the practice as "[d]ocket control by execution date"); see also Mark Ballard, *Death Penalty System Ridiculed*, TEXAS LAWYER, May 11, 1992, at 4 (quoting Fifth Circuit Judge Thomas Reavley's criticism of Texas' system of "jump-starting" habeas corpus appeals by setting premature execution dates).

Petitioner does not dispute that the state has a legitimate interest in seeing that habeas corpus appeals are pursued efficiently by death row inmates; however, considerably less cruel methods are available to assure that habeas corpus appeals are pursued by death row inmates in an efficient manner than Texas' preferred method of setting execution dates. For instance, Texas could enact a reasonable statute of limitations requiring habeas appeals to be filed within a specified period of time. Trial courts could also informally set filing deadlines, which could be enforced with the threat of setting an execution date in the event that such appeals were not timely filed.

[10] See TEX. CODE CRIM. PRO. Art. 42.12, § 15(b) (Vernon's ed. 1979) (capital murder defendant sentenced to "life" eligible for parole after 20 flat calendar years from time that he is taken into custody).

decision on Mr. Lackey's first automatic, mandatory direct appeal. Mr. Lackey's death sentence was re-imposed after a re-trial in early 1983. It then took another eight years for the Texas Court of Criminal Appeals to finally resolve Mr. Lackey's second mandatory direct appeal in 1991. Mr. Lackey's conviction thus became final *14 years* after he was indicted for capital murder. Mr. Lackey exhausted his first round of state and federal habeas corpus appeals in less than three years. ***Thus, only a fraction of the total time that Mr. Lackey has spent on death row is attributable to the delay occasioned by the filing discretionary appeals that he has initiated.***

In this regard, Mr. Lackey's case should be contrasted with other long-time residents of death row, whose delay between trial and execution of a death sentence is largely a function of the inmates' decisions to pursue discretionary appeals. See, e.g., Richmond v. Lewis, 948 F.2d 1473, 1491 (9th Cir. 1990) (rejecting superficially similar claim of a 16-year resident of Arizona's death row, whose discretionary habeas corpus appeals were responsible for the vast majority of the time he had spent on death row).

B. The "Death Row Phenomenon" as Unconstitutional Torture

The torturous effects of the "death row phenomenon" -- that is, the psychologically devastating effects of a lengthy stay on death row -- have been widely noted by jurists during the last three decades. See, e.g., Coleman v. Balkcom, 451 U.S. 949, 952

(1981) (Stevens, J., concurring in the denial of certiorari) (recognizing that the mental pain suffered by a condemned prisoner awaiting execution "is [a] significant form of punishment" that "may well be comparable to the consequences of the ultimate step itself [*i.e.*, the actual execution]"); Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."); Furman v. Georgia, 408 U.S. 238, 288-89 (1972) (Brennan, J., concurring) ("[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."); People v. Anderson, 493 P.2d 880, 6 Cal.3d 628, 649 (Cal. 1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to the execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the [protracted] process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."); Suffolk County District Attorney v. Watson, 411 N.E.2d 1274, 1289-95 & nn. (Mass. 1980) (Liacos, J., concurring) (vivid and detailed description of the type of psychological pain and torture that a condemned person

experiences while awaiting execution); id. at 1287 (Braucher, J., concurring) (arguing that capital punishment is unconstitutional under Massachusetts Constitution in part because "it will be carried out only after agonizing months and years of uncertainty"); Commonwealth v. O'Neal, 339 N.E.2d 676, 680-81 (Mass. 1975) (Tauro, C.J., concurring) ("The convicted felon suffers extreme anguish in anticipation of the extinction of his existence."); State v. Richmond, 886 P.2d 1329, 1994 WL 699008, at *3 (Ariz. Dec. 15, 1994); Hopkinson v. State, 632 P.2d 79, 209-11 (Wyo. 1981) (Rose, C.J., dissenting in part) (recognizing "the dehumanizing effects of long imprisonment pending execution"); State v. Ross, 646 A.2d 1318, 1379 (Conn. 1994) (Berdon, J., dissenting) (same); Soering v. United Kingdom, 11 Eur. Hum. Rts. Rep. 439 (1989) (European Court of Human Rights refused to extradite a German national from UK to Virginia to face capital murder charges because of anticipated time that he would have to spend on death row if sentenced to death); Vatheeswaran v. State of Tamil Nadu, 2 S.C.R. 348, 353 (India 1983) (criticizing the "dehumanizing character of the delay" in carrying out an execution); Sher Singh et al. v. The State of Punjab, 2 S.C.R. 582 (India 1983) ("Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed."); Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimb. June 24, 1993) (reported in 14 HUM. RTS. L. J. 323 (1993)).

Similar views have been expressed by legal commentators and mental health experts. See, e.g., Schabas, *Execution Delayed, Execution Denied*, 5 CRIM. L. FORUM 180 (1994) [available on WESTLAW]; Lambrix, *The Isolation of Death Row* in FACING THE DEATH PENALTY 198 (M. Radelet ed. 1989); Millemann, *Capital Post-Conviction Prisoners' Right to Counsel*, 48 MD. L. REV. 455, 499-500 (1989) ("There is little doubt that the consciousness of impending death can be immobilizing. ... This opinion has been widely shared by [jurists], prison wardens, psychiatrists and psychologists, and writers.") (citing authorities); Mello, *Facing Death Alone*, 37 AMER. L. REV. 513, 552 & n.251 (1988) (same) (citing studies); Wood, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 37-39 (1986) ("The physical and psychological pressure besetting capital inmates has been widely noted .... Courts and commentators have argued that the extreme psychological stress accompanying death row confinement is an eight amendment violation in itself or is an element making the death penalty cruel and unusual punishment.") (citing authorities); Stafer, *Symposium On Death Penalty Issues: Volunteering for Execution*, 74 J. CRIM. L. 860, 861 & n.10 (1983) (citing studies); Holland, *Death Row Conditions: Progression Towards Constitutional Protections*, 19 AKRON L. REV. 293 (1985); Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOLOGY REVIEW 141, 157-60 (1979); Hussain & Tozman, *Psychiatry on Death Row*, 39 J. CLINICAL PSYCHIATRY 183 (1979); West, *Psychiatric Reflections on the Death Penalty*, 45

AMER. J. ORTHOPSYCHIATRY 689, 694-95 (1975); Gallemore & Parton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AMER. J. PSYCHIATRY 167 (1972); Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death By Execution*, 119 AMER. J. PSYCHIATRY 393 (1962); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 830 (1972); G. Gottlieb, *Testing The Death Penalty*, 34 S. CAL. L. REV. 268, 272 & n.15 (1961); A. Camus, *Reflections on the Guillotine* in RESISTANCE, REBELLION & DEATH 205 (1966) ("As a general rule, a man is undone waiting for capital punishment well before he dies."); F. Dostoyevsky, THE IDIOT 47-48 (D. Magarshack trans. 1955); Duffy & Hirshberg, EIGHTY-EIGHT MEN AND TWO WOMEN 254 (1962) ("One night on death row is too long, and the length of time spent there by [some inmates] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad.") (quoting former warden of California's San Quentin Prison).

Of the approximately 3,000 persons on death row in this country, only a handful of inmates have spent as long a time on death row as Clarence Lackey. Cf. State v. Richmond, 886 P.2d 1329, 1994 WL 699008, at *1-*2 (Ariz. Dec. 15, 1994). What is especially remarkable about Mr. Lackey's case is that the bulk of his many years on death row was not attributable to Mr. Lackey's filing discretionary appeals. Rather, those fourteen years involved two trials (an original trial and a re-trial) and two automatic, mandatory direct appeals -- proceedings not initiated

by Mr. Lackey. The remainder of the time -- less than three years -- has been spent expeditiously pursuing legitimate state and federal habeas corpus appeals raising many substantial issues. Such a delay, according to Chief Justice Rehnquist, makes "a mockery of our criminal justice system," which "undermine[s] the integrity of the entire criminal justice system." Coleman v. Balkcom, 451 U.S. 949, 958-59 (1981) (Rehnquist, J., dissenting from denial of certiorari).

C. The British Privy Council's Landmark Decision in *Pratt & Morgan*

In addition to the above-cited authorities, Mr. Lackey's Eighth Amendment arguments are strongly supported by a recent landmark decision in a capital appeal rendered by the Judicial Committee of the Privy Council of the United Kingdom (the "Privy Council"),[11] which involved a factual situation quite similar to Mr. Lackey's case. See Pratt & Morgan v. The Attorney General of Jamaica, Privy Council Appeal No. 10 of 1993, 3 WLR 995, 143 NLJ 1639, 2 AC 1, 4 All ER 769 (Nov. 2, 1993) (en banc) (available on LEXIS).

In Pratt, an appeal by two condemned men on Jamaica's death row, the Privy Council, sitting *en banc* for the first time in five decades, unanimously held that carrying out the death sentences of the two men would be "torture," and "inhuman" and

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[11] The Privy Council is the highest appellate court for Commonwealth nations. The jurists who sit on the Privy Council are likewise members of England's highest domestic appellate court, the House of Lords ("the Law Lords").

"degrading" punishment. The Privy Council did not hold that capital punishment was cruel and unusual *per se*, but instead focused on the fact that the condemned men had been on death row for a protracted period of time (fourteen years) and, furthermore, that the men had been read execution warrants on three separate occasions, only to have their scheduled executions stayed shortly before the sentences were to be carried out.

The rationale of the case was summarized in the opening paragraph:

> The appellants ... were arrested 16 years ago for murder ... On 15th January 1979 they were convicted of murder and sentenced to death. ... On three occasions the death warrant has been read to [Pratt and Morgan] and they have been removed to the condemned cells immediately adjacent to the gallows. ... *The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows.*

Slip op., at 1 (emphasis added). As the Privy Council further stated:

> There is an instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

Id. at 16.

The Privy Council's primary focus was on the sheer length of time that Pratt and Morgan were kept on death row, although a significant secondary theme in the court's reasoning was that the

re-set was itself inhumane and cruel. The court quoted Winston Churchill on this point:

> Mr. Winston Churchill expressed the sentiment of the House when he said "people ought not to be brought up to execution, or believe that they are to be executed, time after time whether innocent or guilty, however it may be, whatever the crime. That is a wrong thing."

Id. at 3.

Pratt & Morgan also surveyed the history of English common law regarding the subject of lengthy imprisonment of a condemned man on death row and the repeated setting of execution dates in a single case. The Privy Council concluded that neither practice was condoned historically at common law. See, e.g., id. at 2-3 ("It is difficult to envisage any circumstance in which in England a condemned man would have been kept in prison for years awaiting an execution."); id. at 5 (noting the "common law practice that execution followed as swiftly as practical after sentence"); see also Riley v. Attorney General of Jamaica, 1 AC 719, 3 All ER 469 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman) ("[T]here is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishment to be found in Section 10 of the Bill of Rights of 1689...."), majority opinion overruled by Pratt & Morgan v. Attorney General of Jamaica, 2 AC 1, 4 All ER 769, 3 WLR 557 (Privy Council 1993) (*en banc*).[12]

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[12] As Justice Scalia has recognized, "[t]here is no doubt" that Section 10 of the English Bill of Rights of 1689 "is the (continued...)

Pratt & Morgan, along with U.S. and international authorities discussed herein, offers a firm legal basis for Mr. Lackey's Eighth Amendment claim challenging the State's right to execute the death sentence in this case.[13]

D. Eighth Amendment Authority Supporting Mr. Lackey's Claim

Recent Eighth Amendment decisions have, as a threshold matter, focused on whether a challenged punishment was considered unacceptable at the time of the adoption of our Bill of Rights. See, e.g., Stanford v. Kentucky, 109 S. Ct. 2969, 2974 (1989) (in rejecting claim that the execution of 16 and 17 year olds is cruel and unusual, Court noted that the punishment was not "'one of those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted'") (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)). If a punishment was considered cruel and unusual in 1789, then this Court's Eighth Amendment analysis goes no further; if the Framers considered a punishment cruel and unusual

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[12](...continued)
antecedent" of the cruel-and-unusual-punishments clause of our Eighth Amendment. See Harmelin v. Michigan, 501 U.S. 957, 966 (1991) (opinion of Scalia, J.).

[13] Literally hundreds of American courts and jurists have been guided by the decisions of the Privy Council, the highest expositor of law in our Mother Country, whose common law has greatly shaped our own law. See, e.g., United States v. Raddatz, 447 U.S. 667, 679 (1980) (citing a Privy Council decision with approval); Kilbourn v. Thompson, 103 U.S. 168, 186 (1881) (same); see also Fisher v. United States, 328 U.S. 463, 486-88 (1946) (Frankfurter, J., dissenting) '"This Court in reviewing a conviction for murder ... ought not be behind ... the Privy Council ....") (discussing Privy Council decisions).

in 1789, then *a fortiori* it is cruel and unusual today. See Ford, 477 U.S. at 405-06.

As discussed above, the Privy Council's review of English common law makes it clear that a nearly two-decade stay on death row would *never* have been tolerated at common law *under any circumstances*. Although elaborate appeals in capital cases (leading to frequent re-trials) are a relatively recent phenomenon -- largely a function of this Court's post-Furman Eighth Amendment capital jurisprudence -- the necessary delay occasioned by such appeals cannot constitutionally extend to the point where the State keeps a man on death row for well over a decade because of mandatory appeals, as in this case.[14] That is, even factoring in the incidental delay caused by modern appeals, a state cannot justify taking over a decade to obtain a final conviction and death sentence on direct review. See Pratt & Morgan, slip op. at 20 ("In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that an execution follows as swiftly as practicable after sentence....").

The Texas courts took fourteen years to obtain a constitutional final conviction and sentence in Mr. Lackey's case. Such an inordinate delay -- which would never have been

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[14] Relying on other international law cases, the Privy Council in Pratt held that even if an inordinate delay between trial and execution is attributable to *discretionary* appeals filed by the condemned person, the government nevertheless has no right to carry out an execution if the delay resulted from legitimate, non-frivolous appeals. See, e.g., Pratt & Morgan, slip op., at 18-20 (discussing cases).

permitted at common law -- is by itself a sufficient reason to prohibit the State of Texas from carrying out Mr. Lackey's scheduled execution. The Eighth Amendment requires no more.

Assuming that a particular type of punishment was permitted at the time that the Bill of Rights was adopted -- or, in this case, assuming that the post-Furman requirement of meaningful appellate review in capital cases somehow alters the common law requirement described above -- a second, more difficult question arises: whether a punishment that may have been acceptable to the Framers of the Constitution nonetheless now violates modern society's civilized standards. See, e.g., Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994) (*en banc*) (hanging not a cruel and unusual punishment).

Addressing the second prong of this Court's Eighth Amendment analysis, this Court has interpreted the reach of the Amendment in a "flexible and dynamic manner." Gregg v. Georgia, 428 U.S. 153, 171 (1976); see also Weems v. United States, 217 U.S. 349, 373 (1910) ("a principle, to be vital, must be capable of wider application than the mischief which gave it birth"). Rather, The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). As the concepts of dignity and civility evolve, so too do the limits of what is considered cruel and unusual. Such factors include the practices among the majority of the states in this country and international practices. See, e.g., Stanford v. Kentucky, 492

U.S. 361, 369 (1989); Coker v. Georgia, 433 U.S. 584 (1977); Enmund v. Florida, 458 U.S. 782 (1982).

The latter is obviously particularly relevant for purposes of the claim presented herein. As discussed above, the weight of international authority -- including a recent unanimous decision by the highest court in our Mother Country -- strongly supports Mr. Lackey's contention that his execution would violate the Eighth Amendment.

Other well-established Eighth Amendment principles of broad application are relevant to this Court's analysis. The Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity and decency'" against which forms of punishment must be measured. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citation omitted). It "expresses the revulsion of civilized man against barbarous acts -- the 'cry of horror' against man's inhumanity to his fellow man." Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring).

The Eighth Amendment's restrictions on the ability of a state to impose certain types of punishment "aim ... to protect the condemned from [unnecessary] fear and pain ... or to protect the dignity of society itself from the barbarity of exacting mindless vengeance." Ford v. Wainwright, 477 U.S. 399, 410 (1986). At its core, the Eighth Amendment stands to safeguard "nothing less than the dignity of man." Trop v. Dulles, 356 U.S. 86, 100 (1958). It cannot be gainsaid that keeping a condemned man on death row -- a place that Mr. Lackey has appropriately

described as "one of the loneliest, most miserable places on earth"[15] -- for nearly two decades impugns fundamental human dignity when there is no legitimate state interest justifying the inordinate delay.

In the particular context of capital punishment -- where the infliction of some incidental pain is obviously unavoidable -- this Court's Eighth Amendment analysis of what is "cruel and unusual" turns on whether unnecessary or gratuitous pain is part of the punishment. As the Court stated in State ex. rel. Francis v. Resweber, 329 U.S. 459 (1947):

> The traditional humanity of modern Anglo-American law forbids the infliction of *unnecessary pain* in the execution of the death sentence. Prohibition against the wanton infliction of pain has come to our law from the [English] Bill of Rights [of 1689]. ... Mr. Francis' suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment.... [The Constitution does not protect against] the *necessary suffering* involved in any method employed to extinguish life humanely. The fact that an *unforeseen accident* prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict *unnecessary pain* nor any *unnecessary pain* involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.

Id. at 463-64 (emphasis added).

As a result of the abhorrent conditions to which he has been subjected during the last eighteen years, Clarence Lackey

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[15] See **Appendix A, ¶6.**

has endured a needlessly *lingering* form of torturous psychological punishment that, if the State has its way, will culminate in a lethal injection following the recent issuance of Mr. Lackey's fourth execution warrant. See Gregg v. Georgia, 428 U.S. 153, 170-71 (1976) (unnecessarily lingering form of execution is unconstitutional under the Eighth Amendment) (citing In re Kemmler, 136 U.S. 436, 447 (1890)).

Finally, the fact that Petitioner is challenging the lingering *psychological* anguish resulting from his excessively lengthy stay on death row and repeated execution dates -- and is not alleging *physical* torture -- does not foreclose an Eighth Amendment claim.[16] It is well-established that the infliction of extreme mental anguish can be a form of unconstitutional torture. See, e.g., Trop v. Dulles, 356 U.S. at 102 (expatriation as penalty for desertion "subjects the individual to a fate of ever-increasing fear and distress"); Hudson v. McMillan, 112 U.S. 995, 1004 (1992) (Blackmun, J., concurring) ("I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes [under the Eighth Amendment]. If anything, our precedent is to the contrary."); Furman v. Georgia, 408 U.S. 238, 271-73 (1972) (Brennan, J.,

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[16] In Pratt & Morgan, the British Privy Council focused exclusively on the *mental* torture inflicted on two condemned men on Jamaica's death row. See Pratt and Morgan, slip op., at 1-2 (describing "the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows. It is unnecessary to refer to the evidence describing ... the *emotional and psychological impact of this experience*, for it only reveals that which is to be expected.").

concurring) ("[T]he Framers also knew []that there could be exercises of cruelty other than those which inflicted bodily pain or mutilation."); see also Smith v. Aldingers, 999 F.3d 109, 110 n.4 (5th Cir. 1993) (collecting recent cases holding that mental or psychological torture can violate the Eighth Amendment); cf. In re Medley, 134 U.S. 160, 172 (1890) (recognizing the "immense mental anxiety" that a condemned man experiences when the authorities intentionally refuse to inform him of the precise date of his scheduled execution, and referring to it as "one of the most *horrible feelings* to which he can be subjected") (emphasis added).

Admittedly, In re Medley was an *ex post facto* case. However, its century-old recognition of the "immense" and "horrible" *mental* anguish that a condemned man feels when he does not know the date of his execution -- which this Court recognized as a form of "punishment" implicating the *ex post facto* clause -- is instructive here. Petitioner does not allege that particular type of mental anxiety caused by his confinement on Texas' death row; however, he does contend that the conditions on death row that he has faced have been equally or more "immense" and "horrible." Therefore, to permit the State to carry out an execution after requiring Clarence Lackey to endure such conditions for nearly two decades would unquestionably violate the Eighth Amendment.

E. Inordinate Delay in the Disposition of a Capital Appeal Is Contrary to the Intent of the Legislature

Finally, Petitioner calls this Court's attention to the Texas statute governing the imposition of capital punishment in existence from 1974-91, which expressly provided for an extremely *prompt* automatic direct appeal. See TEX. CODE CRIM. PRO. 37.071(f) (Vernon's ed. 1974) (automatic direct appeal requiring "review within 60 days of certification of record," with a possibility of a 30-day extension upon the showing of "good cause," and providing for priority over non-capital appeals). This statutory provision, which was enacted at the very same time that the Texas Legislature enacted the original post-Furman capital sentencing statute in 1973, evinces a clear legislative judgment that promptness is necessary in automatic capital appeals. Of course, the provision has been ignored by the Texas Court of Criminal Appeals in hundreds of cases, including Mr. Lackey's case.

Although not necessarily dispositive of Mr. Lackey's claim, but cf. Ford v. Wainwright, 477 U.S. 399, 428-29 (1986) (O'Connor, J., concurring), this statutory provision further should inform this Court's analysis of what the Eighth Amendment requires based on a legislative judgment made contemporaneously with the resurrection of capital punishment in Texas after Furman.

F. This Claim is Appropriately Raised at this Juncture

Although Petitioner recognizes that "this Court rarely

grants review at this stage of the [post-conviction] litigation even when the application for state habeas relief is supported by arguably meritorious constitutional claims,"[17] this Court's primary rationale for not doing so is the Court's belief that "federal habeas proceedings [are] the more appropriate avenues [in the first instance] for consideration of federal constitutional claims."[18] In this case, Petitioner has already exhausted one round of federal habeas corpus appeals and -- barring unforeseen circumstances -- does not intend to file a successive federal petition raising this claim.[19]

There is no need to require Petitioner to file a successive

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[17] Kyles v. Whitley, 498 U.S. 931, 932, 111 S. Ct. 333 (1991) (Stevens, J., concurring in denial of stay and certiorari).

[18] Id.

[19] Petitioner believes that such a successive federal petition would not be barred under the federal abuse-of-the-writ doctrine because Petitioner's claim asserts that he is now constitutionally *ineligible* for capital punishment and, thus, permitting his execution would constitute a fundamental "miscarriage of justice." See Sawyer v. Whitley, 112 S. Ct. 2514, 2519-23 (1992); cf. Penry v. Lynaugh, 492 U.S. 302, 329-30 (1989) (interpreting the first exception of Teague v. Lane, 489 U.S. 288 (1989), as encompassing claims asserting that an inmate is *ineligible* for capital punishment; when "the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying [the Teague doctrine] have little force here") (citing Ford v. Wainwright, 477 U.S. 399 (1986)).

A similar claim was raised on federal habeas review in the Court of Appeals; however, it was rejected both on the ground that it was not raised in the federal district court and also (mistakenly) on the ground that it was barred under the Teague retroactivity doctrine. See Lackey v. Scott, 28 F.3d 486, 492 (5th Cir. 1994). Notably, the federal district court denied relief well before the Privy Council's decision in Pratt & Morgan, which was rendered in November 1993.

federal habeas appeal as a prerequisite for review by this Court because Petitioner herein asserts a claim which may be addressed just as appropriately by this Court in the present procedural posture as by a lower federal court. No additional factual development is required. The only issues raised are questions of law. Moreover, under the law of the case doctrine the federal district court and Fifth Circuit would presumably be bound by the Fifth Circuit's mistaken holding on Petitioner's federal habeas appeal that this type of claim is barred under the Teague doctrine.[20] Thus, resort to the lower federal courts would be futile.

Moreover, such a grant of certiorari would hardly be unprecedented in this procedural posture. Indeed, in State ex rel. Francis v. Resweber, 329 U.S. 459 (1947), this Court granted certiorari to a review a state post-conviction habeas corpus appeal. See also Perry v. Louisiana, 494 U.S. 1015 (1990), later proceeding, 498 U.S. 38 (1991) (granting cert. to review state post-conviction appeal).

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[20] Mr. Lackey's requested relief is not barred under this Court's non-retroactivity doctrine, see Teague v. Lane, 489 U.S. 288 (1989), because this is not a species of constitutional claim that could be subject to a Teague retroactivity analysis. Rather, this is a claim that was not fully ripe for consideration until 1992 -- *after* Petitioner's conviction was final. It was not a claim that could have been anticipated at the onset of Mr. Lackey's second direct appeal (*i.e.*, when the brief was filed), since it does not concern anything that happened at trial. Thus, Teague has no application to this type of claim. Finally, assuming *arguendo* that Teague applied to this type of claim, the claim would fall squarely under Teague's first exception because the claim alleges that Mr. Lackey is *ineligible* for capital punishment. See Penry v. Lynaugh, 492 U.S. 302, 329-30 (1989).

CONCLUSION

Although this Eighth Amendment claim may be somewhat novel in the U.S. courts, it is firmly rooted in both this Court's Eighth Amendment jurisprudence and English common law going back three centuries. In order to address the many important Eighth Amendment issues raised by this petition, this Court should grant certiorari and stay Petitioner's imminent execution.

Respectfully submitted,

Robert C. Owen by agreed permission
B. C. Newton

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* Counsel of Record
Member, Supreme Court Bar

STATE OF TEXAS)
)
COUNTY OF WALKER)

AFFIDAVIT OF CLARENCE ALLEN LACKEY

Comes now Clarence Allen Lackey and states the following:

1. My name is Clarence Allen Lackey. I am a death row inmate who is incarcerated at the Ellis One Unit of the Texas Department of Criminal Justice, Institutional Division, in Hunstville, Texas. I am over the age of 21 and am otherwise competent to make this affidavit.

2. I was arrested on capital murder charges in 1977. I was first tried (and convicted and sentenced to death) in 1978. I was told by the trial judge and my attorney that Texas law provided for a mandatory, automatic direct appeal, which was taken to the Texas Court of Criminal Appeals. That court reversed my conviction and sentence in 1982. I then was re-tried in 1983 and again convicted of capital murder and sentenced to death. Once again, I had a mandatory, automatic direct appeal. In 1989, the Texas Court of Criminal Appeals denied my direct appeal and, two years later, in 1991 denied a motion for rehearing. Thereafter, new attorneys took over my case and state and federal habeas appeals were filed.

3. So far four different death warrants (setting my execution dates) have been issued in my case. The first date was in July of 1992. The second date was in October of 1992. The third date was in December of 1992. Each of those execution dates was stayed by the state or federal courts. My fourth execution date is now pending.

4. The many years that I have spent on death row have been filled with severe stress, depression, and anxiety. The experience of the third execution date was the most traumatic for me. I came within a matter of hours of being executed before that third execution date was stayed by a federal court. After the third date was stayed, I became very ill -- emotionally and physically -- as a result of that traumatic experience.

5. Being on death row so long has been an emotional

roller coaster for me. There have been times when I have had great hope that I would win a new trial or have my death sentence commuted. But there have also been countless times when I have believed that the State was actually going to kill me. Preparing for death is a draining experience, both emotionally and spiritually. It should be something that a person has to do only once in a lifetime. I have had to do that many times since being on death row during these many years. I've also had to watch my loved ones experience similar pain.

6. Death row is one of the loneliest, most miserable places on the earth. It is not only miserable because you know the state is planning on killing you, but also because you see the state killing other human beings around you. There have been approximately 90 executions in Texas since I've been here. My inmate identification number is 591. The guys that they're bringing to death row now have their inmate identification numbers in the 1100s. A lot of time has passed, almost two decades, since I've been here. I was a young man when I was arrested. Now I'm approaching my middle aged years.

7. There have been countless times that I have been unable to eat or sleep because of the never-ending stress that I have felt during my lengthy time on death row. Depression and anxiety always follows you around. You never seem to be able to escape it here. I regularly have had nightmares. I have them almost every night when I have had an execution date pending.

8. Although one of my attorneys, Brent Newton, typed this affidavit, it reflects what I have said. I have carefully read this over before signing it.

Affiant further sayeth not.

Clarence Lackey
CLARENCE ALLEN LACKEY

SWORN AND SUBSCRIBED BEFORE ME ON THIS 21st DAY OF FEBRUARY, 1995.

S. Taylor
NOTARY PUBLIC
My commission expires on:

S. TAYLOR
NOTARY PUBLIC
STATE OF TEXAS
Commission Expires 6-27-95

APPENDIX B

CITY of DIFFERDANGE, GRAND DUCHY of LUXEMBOURG (EUROPE).

A F F I D A V I T

Comes now the Affiant, Josette TILLING, and states the following :

1. My name is Josette TILLING. I am a citizen of Luxembourg, a country in Europe. I am over the age of 21 and am otherwise competent to make this affidavit.

2. I have known a Texas death row inmate named Clarence LACKEY for over four years. Since January 1991, I have corresponded with him by mail. In the first two years of knowing Clarence, I corresponded with him on a weekly basis; since December of 1992, I have corresponded with Clarence on a nearly daily basis. He has written me letters nearly every other over day for the last two years. I have also flown to the U.S.A. in order to visit personally with Clarence on numerous occasions at the Ellis One Unit in Huntsville, Texas. I have personally visited with Clarence on 18 different occasions at the prison, for approximately 80 total hours. Although we are not related, I feel like Clarence is a close relative. He has opened up his life to me. I love him very much.

3. Since I have known Clarence, he has had four execution dates set by the Texas courts. The first date was in July of 1992. The second date was in October of 1992. The third date was in December of 1992. Each execution date was ultimately stayed by the courts. Clarence's fourth execution date is now pending.

4. In letters and in personal visits, Clarence has told me about what he felt when those execution dates were scheduled and then stayed. I have also observed the effect of the repeated dates on Clarence. The repeated execution dates have caused Clarence severe stress, depression, anxiety, and fear. The experience of the third execution date was the most traumatic for Clarence. He came within seven hours of being executed before that third execution date was stayed by a court. Clarence became very ill — emotionally, mentally, and physically — as a result of that experience. After this latest execution was scheduled in early 1995, Clarence has become extremely depressed and scared of dying. What has really traumatized Clarence is the repeated nature of the execution dates scheduled between 1992-1995. Clarence's pain has also been the result of the fact that he has spent nearly two decades on death row, waiting to die.

Aloyse BIEL ★ Notaire, DIFFERDANGE ★

..... / .....

5. Clarence has limited intellectual abilities. There was evidence at his trial that he suffers from borderline or mild mental retardation. In many ways, he is very much like a little boy. It is my opinion that his stress and anxiety caused by the repeated execution dates and the length of time that he has been on death row have been increased because of Clarence's limited intellectual abilities.

Affiant further sayeth not.

(Josette TILLING)

SWORN AND SUBSCRIBED BEFORE ME ON THIS 14th DAY OF FEBRUARY, 1995.

Aloyse BIEL ★ Notaire, DIFFERDANGE ★

APOSTILLE

(Convention de la Haye du 5 octobre 1961)

1. Pays: Grand-Duché de Luxembourg
Le présent acte public
2. a été signé par Me Aloyse BIEL
3. agissant en qualité de Notaire
4. est revêtu du sceau/timbre de
Attesté
5. à Luxembourg 6. le 14 FEV. 1995
7. par Ministère des Affaires Etrangères
8. sous N° 199 A 95
9. Sceau/timbre: 10. Signature:

Bernard BACH
Préposé
du Service des Passeports, Visas et Légalisations

APPENDIX C

and psychological impact of this experience, for it only reveals that which it is to be expected. These men are not alone in their suffering for there are now 23 prisoners in death row who have been awaiting execution for more than ten years and 82 prisoners who have been awaiting execution for more than five years. It is against this disturbing background that their Lordships must now determine this constitutional appeal and must in particular re-examine the correctness of the majority decision in *Riley v. Attorney-General of Jamaica* [1983] 1 A.C. 719.

The death penalty.

The death penalty in the United Kingdom has always been carried out expeditiously after sentence, within a matter of weeks or in the event of an appeal even to the House of Lords within a matter of months. Delays in terms of years are unheard of.

In earlier times execution for murder, as opposed to other capital offences, followed immediately after conviction. In 1752 An Act for better preventing the horrid Crime of Murder (25 Geo. 2, c.37) provided that all persons convicted of murder should be executed on the next day but one after sentence, unless convicted on Friday in which case they were to be executed on Monday and kept in solitary confinement upon bread and water until executed. The extreme rigour of this regime of immediate execution for murder was re-enacted in the Offences against the Person Act 1828 (9 Geo. 4, c.31) but was repealed by the Act of 1836 (6 Will. 4, c.30) "more effectually to preserve from an irrecoverable Punishment any Persons who may hereafter be convicted upon erroneous or perjured Evidence" and it was enacted that henceforth sentence of death in murder cases should be pronounced in the same manner and the judge should have the same powers as after convictions for other capital offences.

In England the practice in capital cases, henceforth including murder, was for the sheriff to fix a date of execution in the fourth week after the death sentence was passed. In Scotland, the date of execution was fixed by the court under section 2 of the Criminal Law (Scotland) Act 1830: if sentence was pronounced south of the Forth, it was fixed between 15 and 21 days hence, and if north of the Forth, between 20 and 27 days hence. In both England and Scotland the Court of Appeal heard an appeal in a capital case within three weeks of verdict. If the appeal was unsuccessful a revised execution date was set not less than 14 or more than 18 days after the day when the appeal was dismissed, in order to allow the Secretary of State time to decide whether the sentence should be commuted. The Report of the Royal Commission on Capital Punishment 1949-53 (Cmd. 8932) gave the average delay in 1950 as six weeks if there was an appeal and three weeks if there was not.

In 1947 there was great public disquiet that men convicted of a murder on the Gold Coast had been under

sentence of death for two years. The matter was debated in Parliament and the Colonial Secretary gave an assurance to the House that the rules and practice to be adopted in the Colonies should be quite sufficient to prevent a repetition of the happenings in the Gold Coast. The concern expressed by members of Parliament in the course of the debate reflected the expectation that the Colonies would follow the long established practice in this country that execution would not be long delayed after sentence. Mr. Winston Churchill expressed the sentiment of the House when he said "people ought not to be brought up to execution, or believe that they are to be executed, time after time whether innocent or guilty, however it may be, whatever their crime. That is a wrong thing".

The rules and practice referred to by the Colonial Secretary were those that laid down a strict timetable for appeals to the Judicial Committee of the Privy Council and provided that execution would only be stayed so long as the timetable was adhered to. Such rules were in force in Jamaica before independence and were adopted after independence by the Governor-General in Privy Council on 14th August 1962; it will in due course be necessary to consider why they were not followed in this case.

Delay of the character which has occurred in this case had never happened in Jamaica before independence. Appendix C of the appellants' case contains a schedule showing the time that elapsed between the date of conviction, appeal and execution in 40 capital cases immediately after independence between the years 1962 and 1970. The time is never more than 18 months and usually considerably shorter. The Solicitor-General felt unable to accept the accuracy of this schedule, but no figures were submitted to contradict it, and their Lordships accept it as showing that the delays that are now being encountered in the execution of the death penalty are of fairly recent origin.

It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment. Prior to independence, applying the English common law, judges in Jamaica would have had the like power to stay a long delayed execution, as foreshadowed by Lord Diplock in *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342 when he said at page 1348:-

> "In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not 'by due process of law'."

And as was asserted by Lord Templeman in *Bell v. D.P.P.* [1985] A.C. 937 where at page 950 he said:-

"Their Lordships do not in any event accept the submission that prior to the Constitution the law of Jamaica, applying the common law of England, was powerless to provide a remedy against unreasonable delay."

The Chronology.

It is now necessary to consider and comment upon the course of events that has resulted in the inordinate delay that has occurred in this case.

The murder was committed on 6th October 1977 and the appellants were sentenced to death on 15th January 1979. Their application for leave to appeal was dismissed by the Court of Appeal on 5th December 1980 who said that they would hand down their reasons later. Although notice of application for leave to appeal was given within three days of the conviction on 18th January 1979, it took almost two years to arrange a hearing by the Court of Appeal. Making every allowance for the pressure of work on the Jamaican courts this does seem a long time to arrange a hearing in a capital case which one would have expected to have been expedited. On their application for leave to appeal the appellants both asked that the Court of Appeal should assign legal aid to them. The appeal was listed for hearing before the appellants had been assigned legal aid and had to be taken out of the list on their application on 28th May 1980 so that they might be legally represented. On the following day, 29th May 1980, a legal aid certificate was issued and counsel were assigned to the appellants. It appears therefore that at least part of the delay in hearing the appeal was attributable to the failure to issue a legal aid certificate at a much earlier date.

On 7th January 1981, a month after their application for leave to appeal was dismissed, the appellants wrote to the Registrar of the Court of Appeal requesting that the necessary papers be made available to their Attorneys-at-law so that whenever they wished they could take the case to the Judicial Committee of the Privy Council. On 30th January the Registrar replied to say she had spoken to their Attorney-at-law, Mr. Eric Frater, who had advised her that he was endeavouring to take their matter to the Privy Council in England.

It was at this stage, after the dismissal of their application by the Court of Appeal, that their Lordships would have expected the Governor-General to refer the case to the Jamaican Privy Council (JPC) to advise him whether or not the men should be executed in accordance with sections 90 and 91 of the Constitution which provide:-

"90.-(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf -

(a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions;

(b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;

(c) substitute a less severe form of punishment for that imposed on any person for such an offence; or

(d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.

(2) In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council.

91.(1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of section 90 of this Constitution.

(2) The power of requiring information conferred on the Governor-General by subsection (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgement the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion."

These sections are included in the Constitution against the background of the pre-existing common law practice that execution followed as swiftly as practical after sentence. They must be construed as imposing a duty on the Governor-General to refer the case to the JPC and the JPC to give their advice as soon as practical. In the ordinary course of events the Governor-General should refer a capital case to the JPC immediately after the appeal is dismissed by the Court of Appeal, unless there exist some special circumstances such as a moratorium upon the execution of all death sentences or a decision is awaited in another case of either the Judicial Committee of the Privy Council or a human rights body that may affect the view of the JPC. The Instructions approved by the Governor-General in Privy Council dated 14th

August 1962 for dealing with applications from or on behalf of prisoners under sentence of death for special leave to appeal to the Judicial Committee of the Privy Council are written upon the premise that the date for execution has already been set and will only be postponed if the prisoner adheres to the strict timetable contained in the Instructions. It is implicit in these Instructions that, by the time the prisoner has taken advice as to whether or not he should petition the Judicial Committee of the Privy Council in England, a decision will already have been taken by the JPC as to whether or not he should be executed or reprieved. There is no indication that the letter written to the Registrar on 7th January 1981 was brought to the notice of the Governor-General, and certainly no intimation in writing was sent to the Governor-General of an intention to apply to the Judicial Committee of the Privy Council as required by the Instructions.

Their Lordships were surprised to learn from the written submissions of the respondents that the procedure set out in the 1962 Instructions is no longer adhered to. The respondents say:-

> "The appellants in keeping with what had now become established practice gave no intimation to the Governor-General of his intention to apply for special leave. That procedure had long fallen into disuse; it was a relic of history; it was obsolete; it was not required by law. The practice was now to apply directly to the Registrar of the Court of Appeal so that papers could be sent directly to the solicitors in London."

Their Lordships can perceive no reason why the appellants' case should not have been referred to the JPC for a decision early in 1981. A reason for a short period of delay after the decision of the Court of Appeal in December 1980 may be found in the political debate on the desirability of retaining the death sentence in Jamaica which resulted in a resolution of the Senate on 9th February 1979 to suspend all executions for a period of eighteen months pending the report of a Committee of inquiry. The Committee of Inquiry was appointed in June 1979. Before the Committee reported, an execution took place on 27th August 1980 which drew a protest to the JPC from the Chairman of the Committee. No further executions took place before the Committee reported in March 1981. On 12th May 1981 executions were resumed. The JPC must have considered and advised on the 12th May execution shortly after the Committee reported in March and it is difficult to see why at about that time they should not have considered and advised upon the appellants' case.

It is true that on 12th June 1981 Pratt petitioned the Inter-American Commission on Human Rights (IACHR) but it would not appear that the Jamaican authorities were aware of this until the IACHR wrote to the Government of Jamaica requesting information about Pratt's case on 17th February 1983. So these proceedings provide no answer to the

question why the JPC did not consider the appellants' case in 1981.

If the case had been considered by the JPC at that time and an execution date had been fixed their Lordships have little doubt that this would have galvanised the appellants and their legal advisers into pursuing their application for leave to appeal to the Judicial Committee of the Privy Council. As it was, no date was set for execution and matters were allowed to drift on; whether this was a deliberate policy adopted by the appellants and their advisers or, as seems more likely, due to the appellants' lack of access to legal advice, cannot be determined with any certainty.

Pratt showed renewed interest in the possibility of an appeal to the Judicial Committee of the Privy Council when he wrote on 23rd March 1984 to an English Member of Parliament to enquire about his right to appeal to the Privy Council and received advice in the form of a letter written by the Registrar to the Judicial Committee of the Privy Council which was forwarded to him on 17th May. Pratt then on 16th August wrote to the Registrar of the Court of Appeal asking for the reasons why his application for leave to appeal was dismissed. It then transpired that no reasons had yet been prepared by the judge to whom the writing of the judgment had been assigned. The papers had apparently been put in the wrong bundle and forgotten. This was a serious oversight by the judge and by those in the office of the Court of Appeal who should have reminded him that reasons had not been provided in accordance with the practice of the Court of Appeal, which is to provide a reserved judgment or reasons within three months of a hearing. Prompted by Pratt's request reasons were quickly prepared and handed down on 24th September 1984. No immediate steps were, however, taken to petition the Judicial Committee of the Privy Council.

On 3rd October the IACHR rejected Pratt's submission that his trial was unfair; but recommended that his sentence be commuted for humanitarian reasons.

Again their Lordships do not understand why the case was not then referred to the JPC to advise whether or not the execution should proceed. However it was not and 1985 appears to have been a year of total inactivity.

On 28th January 1986 Pratt petitioned the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights.

On 13th March 1986 the appellants lodged notice of intention to petition for special leave to appeal to the Judicial Committee of the Privy Council. The application for special leave was heard with reasonable dispatch and special leave to appeal was refused by the Judicial Committee of the Privy Council on 17th July 1986. Rule 5

of the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 requires that a petition for special leave should be lodged as soon as possible after judgment. This was certainly not done in this case; but the requirement appears to have been waived without comment.

In dismissing the application Lord Templeman expressed the concern of the Judicial Committee that three years and nine months had elapsed between the dismissal of the appeal and the delivery of the reasons. He said:-

> "On 5th December, 1980 the Court of Appeal dismissed the petitioner's appeal against conviction and the sentence of death for murder and promised to put their reasons for so doing in writing. Those reasons were not delivered until three years and nine months later, namely on 24th September, 1984. During the whole of that period the appellant had sentence of death hanging over him and, of course, no action could be taken on his behalf, or on behalf of the authorities, pending the possibility of an appeal to this Board which could only be considered when those reasons had been delivered."

As Rowe P. pointed out in his judgment in the Court of Appeal this comment was not strictly accurate and undoubtedly misled the two international bodies to whom the appellants petitioned. In practice it is necessary to have the reasons of the Court of Appeal available at the hearing of the application for special leave to appeal, as without them it is not usually possible to identify the point of law or serious miscarriage of justice of which the appellant complains. The availability of the reasons is not, however, a condition precedent to lodging an application for special leave to appeal. Their Lordships have no doubt that if an application for special leave to appeal had been lodged together with a request for the reasons they would have been swiftly delivered as they were when Pratt finally requested them in 1984. Although it is most regrettable that the Court of Appeal overlooked the delivery of its reasons for dismissing the appeal, it is not possible to attribute the delay in lodging the notice of application for leave to appeal to the Judicial Committee of the Privy Council to the lack of reasons.

On 21st July 1986 the UNHRC requested Jamaica not to carry out the death sentence on Pratt and Morgan before it had an opportunity to consider the admissibility of the complaint.

On 18th November 1986 the JPC, apparently for the first time, considered the appellants' case. They did not accede to the request of the UNHRC to stay the execution and the first warrant of execution was issued on 12th February 1987 for execution on 24th February.

On 23rd February the Governor-General issued a stay of execution. The reasons for the stay are not entirely clear but may have been the result of a telegram from the UNHRC

urging a stay of execution and a letter from Mr. Noel Edwards Q.C., to the Governor-General informing him that the case of the appellants was due to be considered by the UNHRC on 23rd March 1987 and the IACHR on 26th March 1987.

The Superintendent of the Saint Catherine District Prison at that time says in his affidavit that he was informed of the stay by telephone at 4.30 p.m. on 23rd February and ten minutes later informed the appellants in the condemned cell and that as soon as he received written confirmation about twenty minutes later the men were removed from the condemned cell and returned to death row. The appellants in their affidavits say that they were not informed of the stay until 45 minutes before they were due to be executed on the morning of 24th February. This is a dispute which their Lordships cannot resolve on the affidavit evidence.

On 9th July 1987 the IACHR pursuant to further representations of Pratt and Morgan informed the Jamaican government of the following findings:-

> "Pratt and Morgan suffered a denial of justice during the period 1980-1984 violative of Article 5(2) of the American Convention on Human Rights. The Commission found that the fact that the Jamaican Court of Appeal issued its decision on December 5 1980 but did not issue the reasons for that decision until four years later, September 24, 1984, was tantamount to cruel, inhuman and degrading treatment because during that four year delay the petitioners could not appeal to the Privy Council and had to suffer four years on death row awaiting execution.
>
> The Inter-American Commission on Human Rights, pursuant to its cable of July 7 1987 requests that the execution of Messrs. Pratt and Morgan be commuted for humanitarian reasons."

This decision, as has already been explained was based on a misunderstanding of the appellants' right to appeal to the Judicial Committee of the Privy Council.

On 13th October 1987 the JPC reconsidered the appellants' case. They did not accede to the request of the IACHR and on their advice the second warrant of execution was issued on 18th February 1988 for execution on 1st March.

On 29th February 1988 the second stay of execution was issued by the Governor-General. This time it appears to have been as a result of a further request from the UNHRC not to execute the men until the Committee had completed their review of the case.

On 24th March the UNHRC decided that the appellants' case was admissible contrary to the submission of the Jamaican government that the appellants had not yet exhausted their domestic remedies and requested Jamaica not to carry out the death sentence until the Committee had arrived at their decision on the merits. Their Lordships observe that it had taken over two years for the Committee to determine that the case was admissible. The ground upon which the Jamaican government had opposed the appellants' submission is stated in paragraph 6(4) of the Committee's decision:-

> "The State party contends that the authors' communications are inadmissible because they have failed to exhaust domestic remedies as required by Article 5(2)(b) of the Optional Protocol. It points out that in respect of the authors' complaints – breach of the right to trial without undue delay and breach of the right to protection against subjection to torture or cruel, inhuman or degrading treatment – it would have been open to the authors to apply to the Supreme Court for redress alleging breaches of these fundamental rights protected by sections 17 and 20(1) of the Jamaican Constitution respectively."

Their Lordships find this a puzzling stance to be taken by the Jamaican government in view of their successful submission in *Riley v. Attorney-General of Jamaica (supra)* that delay in carrying out execution could afford no ground for holding the execution to be in breach of the Jamaican Constitution; unless it is perhaps to be construed as an encouragement to the appellants to challenge the decision in *Riley* and seek relief under the Constitution. This, however, seems to be unlikely in view of the Solicitor-General's formidable argument before their Lordships in support of the majority reasoning in *Riley*. What is certain is that it added to the delay in the Committee dealing with the case on the merits.

On 6th April 1989 the UNHRC gave their decision on the merits. They held that the failure of the Court of Appeal to deliver reasons for 45 months was a violation of Article 14 para. 3(c) and Article 14 para. 5 of the International Covenant on Civil and Political Rights and Optional Protocol which are in the following terms:-

> "3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...
>
> (c) To be tried without undue delay.
>
> ...
>
> 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

The Committee gave the following reasons for their decision:-

> "13.4 The State party has contended that the time span of three years and nine months between the dismissal of the authors' appeal and the delivery of the Court of Appeal's written judgement was attributable to an oversight and that the authors should have asserted their right to receive earlier the written judgement. The Committee considers that the responsibility for the delay of 45 months lies with the judicial authorities of Jamaica. This responsibility is neither dependent on a request for production by the accused in a trial nor is non-fulfilment of this responsibility excused by the absence of a request from the accused. The Committee further observes that the Privy Council itself described the delay as inexcusable (see para. 2.3 above).
>
> 13.5 In the absence of a written judgement of the Court of Appeal, the authors were not able to proceed to appeal before the Privy Council, thus entailing a violation of article 14, paragraph 3(c), and article 14, paragraph 5. In reaching this conclusion it matters not that in the event the Privy Council affirmed the conviction of the authors. The Committee notes that in all cases, and especially in capital cases, accused persons are entitled to trial and appeal without undue delay, whatever the outcome of those judicial proceedings turns out to be."

It seems to their Lordships unlikely that the Committee would have made this finding if they had not been misled into believing that the delay in giving reasons prevented an appeal to the Privy Council.

The Committee also found a violation of Article 7 which provides:-

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

The Committee gave their reasons as follows:-

> "13.6 There are two issues concerning article 7 before the Committee: the first is whether the excessive delays in judicial proceedings constituted not only a violation of article 14, but 'cruel, inhuman and degrading treatment'. The possibility that such a delay as occurred in this case could constitute cruel and inhuman treatment was referred to by the Privy Council. In principle prolonged judicial proceedings do no *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment and an assessment of the circumstances of each case would be necessary.

In the present cases the Committee does not find that the authors have sufficiently substantiated their claim that delay in judicial proceedings constituted for them cruel, inhuman and degrading treatment under article 7.

13.7 The second issue under article 7 concerns the issue of warrants for execution and the notification of the stay of execution. The issue of a warrant for execution necessarily causes intense anguish to the individual concerned. In the authors case, death warrants were issued twice by the Governor-General, first on 13 February 1987 and again on 23 February 1988. It is uncontested that the decision to grant a first stay of execution, taken at noon on 23 February 1987, was not notified to the authors until 45 minutes before the scheduled time of the execution on 24 February 1987. The Committee considers that a delay of close to 10 hours from the time the stay of execution was granted to the time the authors were removed from their death cell constitutes cruel and inhuman treatment within the meaning of article 7."

The Committee did not know that this allegation was strenuously denied by the Jamaican government. The Solicitor-General has told their Lordships that the Jamaican government did not know that this allegation had been made to the Committee on behalf of Pratt and Morgan and that if the government had known of it they would have put in affidavit evidence denying it. If that had been done their Lordships surmise that the Committee, like their Lordships, might have found it difficult to resolve the conflict of evidence and thus to find a violation of Article 7 on the ground of delay of notification in the stay of execution.

The Committee made the following recommendation:-

"It is the view of the Committee that, in capital punishment cases, States parties have an imperative duty to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant. Although in this case article 6 is not directly at issue, in that capital punishment is not *per se* unlawful under the Covenant, it should not be imposed in circumstances where there have been violations by the State party of any of its obligations under the Covenant. The Committee is of the view that the victims of the violations of articles 14, paragraph 3(c), and 7 are entitled to a remedy; the necessary prerequisite in the particular circumstances is the commutation of the sentence."

Eighteen months then passed before a decision was taken by the JPC on this recommendation of the UNHRC. Press reports of Parliamentary proceedings show that in June 1990 the question of the death penalty was under review by the Cabinet but that no conclusions had yet been reached on commuting sentences.

On 17th September 1990 the JPC again reconsidered the appellants' case. They rejected the recommendations made eighteen months earlier by the UNHRC. On 18th February 1991 the warrant of execution was issued for execution on 7th March 1991, the delay in issuing the warrant of execution from 17th September 1990 to 18th February 1991 apparently being accounted for by the wish of the Governor-General to obtain the Attorney-General's advice on the legal status of decisions of human rights bodies. This is advice which it would have been appropriate to place before the members of the JPC at a much earlier date, and before they considered any recommendations of such bodies. Their Lordships have not seen the Attorney-General's advice but do not doubt that it correctly advised that, Jamaica being a signatory to the International Covenant on Civil and Political Rights and to the Optional Protocol, the views of the UNHRC should be afforded weight and respect but were not of legally binding effect; and that the like considerations applied to the IACHR.

On 28th February 1991 the appellants commenced these proceedings pursuant to section 25 of the Constitution and as a result the execution set for 7th March was stayed. On 14th June the Supreme Court dismissed their application.

On 8th June 1992 the Court of Appeal dismissed their appeal and on 18th January 1993 gave leave to appeal to the Judicial Committee of the Privy Council.

The primary submission of the appellants is that to hang them after they have been held in prison under sentence of death for so many years would be inhuman punishment or other treatment and thus in breach of section 17(1) of the Constitution.

Section 17 of the Constitution provides:-

"17.-(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

This submission cannot succeed unless their Lordships are persuaded to prefer the construction of section 17(2) adopted by the minority in *Riley v. A.G. of Jamaica* to that of the majority. The five appellants in *Riley* had been sentenced to death and held in custody for between six and seven years before their appeal was heard by the Privy Council. They submitted that to execute them after such a prolonged delay would contravene their rights

under section 17(1) of the Constitution. By a majority the Privy Council rejected this submission because they construed section 17(2) as authorising execution by hanging for murder no matter how long the delay between the passing of the sentence and the execution. Lord Bridge of Harwich said at page 726:-

"The question, therefore, is whether the delayed execution of a sentence of death by hanging, assuming it could otherwise be described as 'inhuman or degrading punishment or other treatment' - a question on which their Lordships need express no opinion - can escape the unambiguous prohibition imposed by the words in section 17(2) emphasised as follows:

> 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.'

An act will fall within this prohibition if it satisfies three related conditions, viz.: (a) it must be an act done under the authority of law; (b) it must be an act involving the infliction of punishment of a description authorised by the law in question, being a description of punishment which was lawful in Jamaica immediately before the appointed day; (c) it must not exceed in extent the description of punishment so authorised.

There can be no doubt whatever that a delayed execution would satisfy conditions (a) and (b). The only words in section 17(2) that are even arguably ambiguous are the words 'to the extent that'. It seems to their Lordships that in their context these words pose the question: to what extent did the law in Jamaica before independence authorise the description of punishment which is under challenge? This question can only be answered by asking in turn the further question: if the like description of punishment had been inflicted in the like circumstances before independence, would this have been authorised by law? An obvious instance of a description of punishment exceeding in extent that authorised by law would be the execution of a death sentence by burning at the stake. But since the legality of a delayed execution by hanging of a sentence of death lawfully imposed under section 3(1) of the Offences against the Person Act could never have been questioned before independence, their Lordships entertain no doubt that it satisfies condition (c). Accordingly, whatever the reasons for or length of delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of section 17(1)."

This construction of section 17(2) focuses on the act of punishment, and proceeds upon the assumption that the legality of a long delayed execution could never have been questioned before independence. Their Lordships, having had the benefit of much fuller argument, cannot accept that there could have been no challenge to a long delayed execution before independence and for the reasons already given are satisfied that such an execution could have been stayed as an abuse of process. The due process of law does not end with pronouncement of sentence - see *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342.

The minority, who would have allowed the appeal, adopted a narrower construction of section 17(2) which limited the scope of the sub-section to authorising the passing of a judicial sentence of a description of punishment lawful in Jamaica before independence and they held it was not concerned with the act of the executive in carrying out the punishment.

Their Lordships are satisfied that the construction of section 17(2) adopted by the minority is to be preferred. The purpose of section 17(2) is to preserve all descriptions of punishment lawful immediately before independence and to prevent them from being attacked under section 17(1) as inhuman or degrading forms of punishment or treatment. Thus, as hanging was the description of punishment for murder provided by Jamaican law immediately before independence, the death sentence for murder cannot be held to be an inhuman description of punishment for murder.

Section 17(2) does not address the question of delay and is not dealing with the problem that arises from delay in carrying out the sentence. The primary purpose of the Constitution was to entrench and enhance pre-existing rights and freedoms, not to curtail them. Before independence the law would have protected a Jamaican citizen from being executed after an unconscionable delay, and their Lordships are unwilling to adopt a construction of the Constitution that results in depriving Jamaican citizens of that protection.

The majority also relied upon the judgment of the Board in *de Freitas v. Benny* [1976] A.C. 239. In that case which concerned the construction of the Constitution of Trinidad and Tobago the time scale was wholly different from the present case. The appellant had been sentenced to death in August 1972 and his constitutional appeal was heard and determined by the Privy Council in May 1975. Their Lordships in *de Freitas v. Benny* said that they had difficulty in formulating the appellants' argument based on delay: but it appears to have been founded upon a submission that as the time between sentence and execution was before independence on average five months, an execution that involved a delay longer than this was open to attack as cruel and unusual punishment.

Their Lordships dismissed this argument without calling on the respondents. Both the argument and the extent of the delay are so different from the present appeal that their Lordships are unable to gain any assistance from this decision.

Their Lordships will therefore depart from *Riley* and hold that section 17(2) is confined to authorising descriptions of punishment for which the court may pass sentence and does not prevent the appellant from arguing that the circumstances in which the executive intend to carry out a sentence are in breach of section 17(1).

The Court of Appeal rightly held that they were bound by the majority decision in *Riley* and did not therefore consider whether the appellants had been subjected to inhuman or degrading punishment or treatment within the meaning of section 17(1). It is however to this question which is central to this appeal that their Lordships must now turn.

There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time. But before their Lordships condemn the act of execution as "inhuman or degrading punishment or other treatment" within the meaning of section 17(1) there are a number of factors that have to be balanced in weighing the delay. If delay is due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process the accused cannot be allowed to take advantage of that delay for to do so would be to permit the accused to use illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime.

A much more difficult question is whether the delay occasioned by the legitimate resort of the accused to all available appellate procedures should be taken into account, or whether it is only delay that can be attributed to the shortcomings of the State that should be taken into account.

There is a powerful argument that it cannot be inhuman or degrading to allow an accused every opportunity to prolong his life by resort to appellate procedures however extended may be the eventual time between sentence and execution. This is the view that currently prevails in some States in the United States of America and has resulted in what has become known as the death row phenomenon where men are held under sentence of death for many years while their lawyers pursue a multiplicity of appellate procedures. Powerful statements in support of this point of view appear in the opinion of Circuit Judge O'Scannlain in *Richmond v. Lewis* (1990) 948 F. 2d. 1473, a decision of the United States Court of Appeals for the Ninth Circuit, and in the judgment of La Forest J. in *Kindler v. Canada (Minister of Justice)*

(1991) 67 C.C.C. (3d) 1, a decision of the Supreme Court of Canada. A further valuable analysis of the decisions in the United States Courts appears in the judgment of the Supreme Court of Zimbabwe in *Catholic Commission for Justice and Peace in Zimbabwe v. The Attorney General and Others* (Judgment No. S.C. 73/93, unreported, delivered on 24th June 1993).

Support for this view is also to be found in previous decisions of the Privy Council. In *Abbott v. A.G. of Trinidad and Tobago* [1979] 1 W.L.R. 1342 an unsuccessful appeal against the death sentence was made upon the ground that the period of eight months taken to reject the petition for reprieve infringed the appellant's constitutional rights. The appeal was heard by the Privy Council on 4th April 1979 nearly six years after the conviction on 16th July 1973. In delivering the judgment of the Board, Lord Diplock said at page 1345:-

> "That so long a total period should have been allowed to elapse between the passing of a death sentence and its being carried out is, in their Lordships' view, greatly to be deplored. It brings the administration of criminal justice into disrepute among law-abiding citizens. Nevertheless their Lordships doubt whether it is realistic to suggest that from the point of view of the condemned man himself he would wish to expedite the final decision as to whether he was to die or not if he thought that there was a serious risk that the decision would be unfavourable. While there's life, there's hope. At any rate, as in *de Freitas v. Benny* [1976] A.C. 239, it has to be conceded that the applicant cannot complain about the delay totalling three years preceding his petition for pardon caused by his own action in appealing against his conviction or about the delay totalling two years subsequent to the rejection of his petition caused by his own action in appealing against the sentence on constitutional grounds. His case as advanced before their Lordships has depended solely on the period of somewhat less than eight months sandwiched between the two longer periods, which was allowed by the state to elapse between the lodging of his petition for pardon and its rejection by the President. This it is claimed amounted to delay so inordinate as to involve a contravention of his constitutional rights."

In *Riley* Lord Bridge of Harwich said at page 724:-

> "Apart from the delays necessarily occasioned by the appellate procedures pursued by the applicant (of which it could hardly lie in any applicant's mouth to complain)."

Lord Scarman and Lord Brightman concluded their dissenting judgment by saying at page 736:-

> "Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment. It is, of course, for the applicant for constitutional protection to show that the delay was inordinate, arose from no act of his, and was likely to cause such acute suffering that the infliction of the death penalty would be in the circumstances which had arisen inhuman or degrading."

However, in an earlier passage of their judgment at page 735 Lord Scarman and Lord Brightman said:-

> "It is, of course, true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading."

Their Lordships are therefore doubtful whether Lord Scarman and Lord Brightman would have regarded delay caused by appeals made within the time scale permitted by the State as time to be left out of account in computing the total period of delay.

There are other authorities which do not accept that delay occasioned by use of appeal procedures is to be disregarded. In *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General (supra)* Gubbay C.J. said:-

> "It seems to me highly artificial and unrealistic to discount the mental agony and torment experienced on death row on the basis that by not making the maximum use of the judicial process available the condemned prisoner would have shortened and not lengthened his suffering. The situation could be otherwise if he had resorted to a series of untenable and vexatious proceedings which, in consequence, had the effect of delaying the ends of justice."

And he expressed his dissent from the contrary view contained in *Abbott v. A.G. of Trinidad and Tobago and Others*.

In *Soering v. United Kingdom* (1989) 11 E.H.R.R. 439 the applicant, a West German national, alleged that the decision by the Secretary of State for the Home Department to extradite him to the United States of America to face trial in Virginia on a charge of capital murder would, if implemented, give rise to a breach by the United Kingdom of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Cmd. 8969) which provides that no one should be subjected to torture or to inhuman or degrading treatment or punishment.

The United States had applied to the United Kingdom to extradite the applicant to stand trial in the State of Virginia on a charge of capital murder. The European Court of Human Rights recognised that the death row phenomenon in Virginia where prisoners were held for a period of six to eight years before execution arose from repeated applications by the prisoner for a stay of execution but nevertheless held that such a long period of delay might go beyond the threshold set by Article 3.

In India, where the death penalty is not mandatory, the appellate court takes into account delay when deciding whether the death sentence should be imposed. In *Vatheeswaran v. State of Tamil Nadu* [1983] 2 S.C.R. 348 Chinnappa Reddy J. said at page 353:-

> "While we entirely agree with Lord Scarman and Lord Brightman about the dehumanising effect of prolonged delay after the sentence of death, we enter a little caveat, but only that we may go further. We think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay, the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanising character of the delay."

The court held that delay exceeding two years in the execution of a sentence of death should be sufficient to entitle a person under sentence of death to demand the quashing of his sentence on the ground that it offended against Article 21 of the Indian Constitution which provides "No person shall be deprived of his life or personal liberty except according to procedure established by law".

In *Sher Singh and Others v. The State of Punjab* [1983] 2 S.C.R. 582 the court held:-

> "Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But no hard and fast rule that 'delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death' can be laid down as has been in *Vatheeswaran*."

The court pointed out that to impose a strict time limit of two years would enable a prisoner to defeat the ends of justice by pursuing a series of frivolous and untenable proceedings.

In *Smt. Treveniben v. State of Gujarat* (1989) 1 S.C.J. 383 the Supreme Court of India approved the judgment in *Sher Singh v. The State of Punjab* and held

that a sentence of death imposed by the "Apex Court", which will itself have taken into account delay when imposing the death sentence, can only be set aside thereafter upon petition to the Supreme Court upon grounds of delay occurring after that date. Oza J. said, at page 410:-

> "If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether, it is just and fair to allow the sentence of death to be executed."

In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.

The application of the appellants to appeal to the Judicial Committee of the Privy Council and their petitions to the two human rights bodies do not fall within the category of frivolous procedures disentitling them to ask the Board to look at the whole period of delay in this case. The total period of delay is shocking and now amounts to almost fourteen years. It is double the time that the European Court of Human Rights considered would be an infringement of Article 3 of the European Convention and their Lordships can have no doubt that an execution would now be an infringement of section 17(1) of the Jamaican Constitution.

To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of section 17(1). In the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case and there may be difficult borderline decisions to be made. This, however, is not a borderline case. The delay in this case is wholly unacceptable and this appeal must be allowed.

In arriving at this conclusion their Lordships do not overlook the reliance placed by the Solicitor-General on the dissenting judgment of Sir Gerald Fitzmaurice in *The Republic of Ireland v. The United Kingdom* (1978) 2 E.H.R.R. 25, 120 but prefer an interpretation of the Constitution of Jamaica that accepts civilised standards of behaviour which will outlaw acts of inhumanity, albeit they fall short of the barbarity of genocide.

Section 25(2) of the Constitution provides that:-

> "The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled."

The width of the language of this subsection enables the court to substitute for the sentence of death such order as it considers appropriate. The appropriate order in the present case is that the sentence of death of each appellant should be commuted to life imprisonment.

Their Lordships are very conscious that many other prisoners under sentence of death are awaiting the outcome of this appeal. In an attempt to assist the Jamaican authorities who may be faced with a large number of appeals their Lordships wish to make some general observations.

The delay in this case would never have reached anything like its present dimensions if the Governor-General and the JPC had reviewed the case pursuant to sections 90 and 91 of the Constitution early in 1981 after the Court of Appeal had dismissed the appellants' application for leave to appeal. As has already been pointed out, there was no reason why the case should not have been reviewed at that time and it appears inevitable in the light of after events that the JPC would have advised that the execution should proceed and a date would have been set. This would have provided the impetus for an immediate application to the Judicial Committee of the Privy Council which would have been disposed of in the summer of 1981 and a new execution date set within a matter of weeks. If this had occurred, the grounds upon which the two human rights bodies recommended commutation of sentence to life imprisonment would never have arisen, because the Court of Appeal would have been prompted to deliver their reasons by the application to the Judicial Committee of the Privy Council and the execution would have taken place years before the late reprieve of which the appellants have complained.

There may of course be circumstances which will lead the JPC to recommend a respite in the carrying out of a death sentence, such as a political moratorium on the death sentence, or a petition on behalf of the appellants to IACHR or UNHRC or a constitutional appeal to the Supreme Court. But if these respites cumulatively result in delay running into several years an execution will be likely to infringe section 17(1) and call for commutation of the death sentence to life imprisonment.

Their Lordships are very conscious that the Jamaican government faces great difficulties with a disturbing murder rate and limited financial resources at their disposal to administer the legal system. Nevertheless, if capital punishment is to be retained it must be carried out with all possible expedition. Capital appeals must be expedited and legal aid allocated to an appellant at an early stage. The aim should be to hear a capital appeal within twelve months of conviction. The procedure contained in the Governor-General's Instructions should be reinstated so that the JPC consider the case shortly after the Court of Appeal hearing and if an execution date is set and there is to be an application to the Judicial Committee of the Privy Council it must be made as soon as possible, as both the rules of the Judicial Committee of the Privy Council and the Governor-General's Instructions require, in which case it should be possible to dispose of it within six months of the Court of Appeal hearing or within a further six months if there is to be a full hearing of the appeal. In this way it should be possible to complete the entire domestic appeal process within approximately two years. Their Lordships do not purport to set down any rigid timetable but to indicate what appear to them to be realistic targets which, if achieved, would entail very much shorter delay than has occurred in recent cases and could not be considered to involve inhuman or degrading punishment or other treatment.

The final question concerns applications by prisoners to IACHR and UNHRC. Their Lordships wish to say nothing to discourage Jamaica from continuing its membership of these bodies and from benefiting from the wisdom of their deliberations. It is reasonable to allow some period of delay for the decisions of these bodies in individual cases but it should not be very prolonged. The UNHRC does not accept the complaint unless the author "has exhausted all available domestic remedies". The UNHRC has decided in this case and in *Carlton-Reid* that a constitutional motion to the Supreme Court of Jamaica is not a remedy to which the complainant need resort before making an application to the Committee under the Optional Protocol. A complainant will therefore be able to lodge a complaint immediately after his case has been disposed of by the Judicial Committee of the Privy Council. If, however, Jamaica is able to revise its domestic procedures so that they are carried out with reasonable expedition no grounds will exist to make a complaint based upon delay. And it is to be remembered that the UNHRC does not consider its role to be that of a further appellate court:-

> "The Committee observes that it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before domestic courts and to review the interpretation of domestic law by national courts. Similarly, it is for the appellate courts and not for the Committee to review specific instructions to the jury by the judge, unless it is apparent from the author's submission that the instructions to the jury were clearly arbitrary or tantamount to a denial of justice, or that the judge manifestly violated his obligation of impartiality."

It therefore appears to their Lordships that provided there is in future no unacceptable delay in the domestic proceedings complaints to the UNHRC from Jamaica should be infrequent and when they do occur it should be possible for the Committee to dispose of them with reasonable dispatch and at most within eighteen months.

These considerations lead their Lordships to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment". If, therefore, rather than waiting for all those prisoners who have been in death row under sentence of death for five years or more to commence proceedings pursuant to section 25 of the Constitution, the Governor-General now refers all such cases to the JPC who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment, substantial justice will be achieved swiftly and without provoking a flood of applications to the Supreme Court for constitutional relief pursuant to section 17(1).

The appellants pursued alternative grounds of appeal upon which their Lordships find it unnecessary to express any conclusions.

Their Lordships will accordingly humbly advise Her Majesty that this appeal ought to be allowed, and the sentences of the appellants be commuted to life imprisonment.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CLARENCE LACKEY

Petitioner,

v.

STATE OF TEXAS

Respondent.

MOTION TO PROCEED *IN FORMA PAUPERIS*

Petitioner Clarence Lackey, an indigent, respectfully moves this Court for leave to file the attached Petition for Writ of Certiorari without costs and to proceed *in forma pauperis* in this Court. An affidavit of indigency is attached hereto.

Respectfully submitted,

Robert C. Owen by express permission
Brent E. Newton

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AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, CLARENCE LACKEY being first duly sworn, depose and say that I am the Petitioner in the above- entitled case; that in support of my motion to proceed without being required to repay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes___ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received. 1977 $480/month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources? Yes___ No X

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes___ No X
   If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No X

   a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are depending upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Clarence Lackey

Subscribed and sworn to before me this 22 day of Sept. 19 94.

Greg Wiericoch
Notary

My commission expires 5-5-98

Greg Wiericoch NOTARY PUBLIC STATE OF TEXAS EXPIRES 5-5-98

A-643
No. 94-8262

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1994

CLARENCE ALLEN LACKEY,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Court of Criminal Appeals of Texas

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RESPONDENT'S BRIEF IN OPPOSITION AND OPPOSITION TO MOTION FOR STAY OF EXECUTION

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---

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QUESTIONS PRESENTED

1. Whether a petition for writ of certiorari to the state's highest court on that court's denial of a successive state habeas application should be denied as an inappropriate attempt to avoid the abuse of the writ doctrine where the same claims could not be advanced in federal court due to the abuse of the writ doctrine.

2. (a) Whether this Court has jurisdiction to review a claim rejected in a state habeas corpus proceeding where the basis of the denial was an adequate and independent state law ground.

   (b) Whether the delay occasioned by the pursuit of appellate and collateral review of a conviction and sentence of death violates the Eighth Amendment proscription against cruel and unusual punishment.

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A-643
No. 94-8262

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1994

CLARENCE ALLEN LACKEY,
Petitioner,
v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION
AND OPPOSITION TO MOTION FOR STAY OF EXECUTION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent,[1] and files this Brief in Opposition and Opposition to Motion for Stay of Execution.

OPINION BELOW

The order of the Texas Court of Criminal Appeals denying Lackey's state application for a writ of habeas corpus is unpublished, but a copy is attached to the supplement to the petition as Appendix B. The trial court's findings and conclusions are attached to the supplement to the petition as Appendix A.

---

[1] For clarity, Respondent will be referred to as "the state" and Petitioner Clarence Allen Lackey, as "Lackey."

JURISDICTION

Lackey seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Lackey bases his claims upon the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The State has lawful custody of Lackey pursuant to a judgment and sentence of the 238th Judicial District Court of Midland County, Texas, Cause No. 18,075.

First Trial

On August 3, 1977, Lackey was charged by indictment with the capital offense of intentional murder of Toni Diane Kumpf during the course of a burglary or an aggravated sexual assault. Following a transfer of venue to Tom Green County and a jury trial to determine Lackey's competence to stand trial, Lackey was convicted of capital murder on February 18, 1978. The jury affirmatively answered the special punishment issues two days later, and the trial court subsequently imposed the sentence of death on March 30, 1978.

On April 17, 1982, the Texas Court of Criminal Appeals abated Lackey's appeal to allow a retrial of the competency issue. On May 18, 1982, a jury determined that Lackey was competent to stand trial. However, on September 17, 1982, the Court of Criminal Appeals reversed the conviction, because the trial court improperly excluded for cause a prospective juror. *Lackey v. State*, 638 S.W.2d 439 (Tex.Crim.App. 1982).

Second Trial

On remand, venue was transferred to Midland County, Texas, and Lackey was again tried before a jury upon a plea of not guilty. On April 15, 1983, the jury found Lackey guilty of capital murder. A separate punishment hearing ensued and, on April 16, 1983, the jury answered affirmatively the two special issues submitted pursuant to former Article 37.071(b) of the Texas Code of Criminal Procedure. In accordance with Texas law, the trial court sentenced Lackey to death by lethal injection on May 2, 1983.

Lackey directly appealed to the Court of Criminal Appeals of Texas, which affirmed the conviction and sentence on June 14, 1989. *Lackey v. State*, 816 S.W.2d 392 (Tex.Crim.App. 1989). Following the Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court of Criminal Appeals granted Lackey's motion for rehearing. After supplemental briefing and argument, the Court of Criminal Appeals affirmed Lackey's sentence on May 29, 1991. *Lackey v. State*, 819 S.W.2d 111 (Tex.Crim.App. 1991). Lackey's second motion for rehearing was denied on September 25, 1991. Because Lackey did not seek certiorari review, his conviction became final on December 24, 1991, the date upon which the time for filing a petition for writ of certiorari expired. *See Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986).

First State Habeas Action

No action was taken by Lackey until after the trial court, on April 17, 1992, conducted a hearing prior to setting an execution date. On April 28, 1992, the court entered an order scheduling Lackey's execution for July 17, 1992. On July 9, 1992, the court permitted Lackey to substitute counsel, and on July 13, 1992, substitute counsel requested that the execution date be modified so that counsel could investigate and present claims in a state habeas application. The trial court granted the motion the same day and rescheduled the execution date for October

17, 1992. On September 17, 1992, Lackey again requested that the execution date be modified, and the trial court again granted the request. Lackey's execution was then set for December 17, 1992. On December 3, 1992, the court held a hearing on four motions filed by Lackey: a motion for discovery, which was denied[2]; a motion for funds for experts, which was denied; a motion to transcribe Lackey's second competency hearing, which was granted; and a motion to modify the execution date for the third time, which was denied.

On December 11, 1992, less than six days prior to the scheduled execution (and only eight days since the trial court denied Lackey's third request for a modification of the execution date), Lackey filed a 122-page state habeas application, raising 22 separate claims for relief. At 9:00 a.m. on December 16, 1992, the trial court entered findings of fact and conclusions of law and recommended that relief be denied. The Court of Criminal Appeals of Texas adopted the trial court's findings and denied relief at approximately 2:30 p.m. on December 16, 1992. *Ex parte Lackey*, No. 24,267-01 (Tex.Crim.App. Dec. 16, 1992).

First Federal Habeas Action

Lackey then filed a federal habeas petition and request for a stay of execution in the United States District Court for the Western District of Texas, Midland-Odessa Division. After the state announced that it did not oppose a stay, the district court granted the stay at 4:27 p.m. on December 16, 1992. The Director of the Texas Department of Criminal Justice, Institutional Division, responded on January 12, 1993. After conducting an evidentiary hearing and receiving post-hearing briefing, the district court denied federal habeas relief, but granted a certificate of probable cause to appeal.

---

[2] Mike West, an assistant district attorney for Lubbock County, offered Lackey's habeas counsel the opportunity to review the prosecution's files.

Lackey appealed the district court's denial of habeas relief to the Fifth Circuit Court of Appeals. The Fifth Circuit initially set the case for oral argument, but after receiving supplemental briefing from both parties, issued its opinion affirming the district court's denial of habeas relief without argument. *Lackey v. Scott*, 28 F.3d 486 (5th Cir. 1994). Lackey then filed a petition for writ of certiorari in this Court, which was denied on January 9, 1995. *Lackey v. Scott*, 115 S.Ct. 743 (1995).

Second State Habeas Action

On February 2, 1995, the trial court scheduled Lackey's execution for March 6, 1995. Lackey filed a state application for writ of habeas corpus on February 23, 1995. The trial court entered findings of fact and conclusions of law recommending denial of habeas relief on March 1, 1995. Based upon the findings of the trial court, the Texas Court of Criminal Appeals denied relief on the same day. *Ex parte Lackey*, No. 24,267-02 (Tex.Crim.App. March 1, 1995).

B. Statement of Facts

The opinion of the Court of Criminal Appeals of Texas (partly quoting from its summary of the evidence in its previous appellate review of the case) adequately summarizes the evidence introduced at Lackey's trial:

> Diane Kumph was abducted from her Lubbock apartment shortly before dawn on July 31, 1977. Later that day, her partially nude body was discovered beside a dirt road outside of Lubbock, near [Lackey's] house. It appeared Kumph had been raped. She had been severely beaten. Her neck, face, arms, chest, back and legs were covered with bruises. Her throat had been slashed. This caused her death.
>
> A policeman who responded to a neighbor's report testified that it appeared that the front door of Kumph's apartment had been

> kicked open. There were indications that a violent struggle had occurred in her apartment.
>
> A fingerprint expert testified that a latent fingerprint discovered on a cigarette package found in the victim's bed belonged to [Lackey]. The brand was the same brand as a pack found on [Lackey] at the time of the arrest. Blood found on [Lackey's] boots matched Kumph's blood type. Secretor analysis showed that the individual whose semen was found in Kumph was a secretor and had the same type O blood as did [Lackey]. An expert testified that hairs found on Kumph's body were similar to [Lackey's] and marks found on the door of Kumph's apartment were very similar to the heel print of [Lackey's] boot.
>
> A person living in the adjoining apartment testified that he was awakened in the early morning, went outside, and saw a man matching [Lackey's] physical description driving away in a white pickup. A woman was slumped over in the seat. The truck was missing a hubcap from the right rear wheel. [Lackey], at the time of the murder, had use of a white pickup that was missing a hubcap from the right rear wheel. [Lackey] was identified by an acquaintance as having been in this truck, driving in Lubbock at approximately 5:00 a.m. on the morning of Kumph's abduction.
>
> Another resident of the adjoining apartment testified that she was awakened that morning by loud banging, and screams of "help me" and "get off me" coming from Kumph's apartment.
>
> [Lackey's] roommate, Carrol Johnson, testified that she had been at work all night the night of the murder. When she returned home that morning, about 7:30 a.m., [Lackey] was not home, but there was fresh blood all about the

house. Shortly after her return, [Lackey] phoned Johnson and said he was doing some laundry at a laundromat. He arrived at the house a half hour later with a bedspread and sheets he had washed. He burned a throw rug. Later that day, as Johnson and [Lackey] were discussing radio reports of the murder of Kumph and the search for a suspect, [Lackey] admitted to Johnson: "Baby, I've got to tell you something--I'm the one they're looking for."

More incriminating evidence was seized in a search of [Lackey's] house and the white truck. Leaves found on Kumph's face were very similar to leaves found in the truck, according to expert testimony. Hair taken from the truck was very similar to Kumph's, according to the expert. Sweepings from [Lackey's] apartment revealed hair that was very similar to Kumph's, according to more expert testimony. Blood found throughout [Lackey's] home matched Kumph's blood type, including that found on a blood soaked mattress. Blood was also found on the porch and on the exterior of [Lackey's] house. That blood matched Kumph's type. Blood found on the pickup matched the deceased's type. *Lackey* [*v. State*], 638 S.W.2d at 439-40.

* * *

Both the State and [Lackey] introduced evidence at the penalty stage of the trial, though [Lackey] chose not to testify. The State proved that [Lackey] was first convicted of a felony on September 6, 1973, when he was convicted of burglary and placed on felony probation. The State also showed the jury that [Lackey] was convicted on January 9, 1975, of the felony offense of burglary with intent to commit rape from an incident at the habitation of Ms. Rita Featherston on June 7, 1974. His previous felony conviction was revoked on January 9, 1975, based upon the burglary with intent to commit rape charge.

[Lackey] was sentenced to two concurrent five year sentences to be served in the Texas Department of Corrections.

The State also relied on the facts of the crime itself. [Lackey] was a stranger to the victim, who he apparently chose at random when he kicked open the door to her apartment in the pre-dawn hours of July 31, 1977. The offense began there and continued across town in Lubbock to his residence where he ultimately killed the victim. In addition to the knife wound from ear to ear across her neck, the victim's body bore evidence of trauma from severe beatings. These facts reflect a crime that was not only senseless, but was also an incident of prolonged brutality and repeated violent acts.

After the commission of the instant offense, [Lackey] dumped the body of the victim on a farmer's property and made a hurried attempt to conceal the evidence of the offense, even going so far as to rush the clothes and sheets to the laundry to clean them of blood. This behavior indicates a lack of remorse by [Lackey] for his actions. It also shows an attempt to destroy evidence of his actions and to evade prosecution.

* * *

Annabelle Lackey, [Lackey's] mother, testified that [Lackey] was moved around to several cities as a child, that [Lackey] did poorly in school, that [Lackey's] father drank a lot, that his father and he "fussed a lot," and that his father "hit him some." She also testified that [Lackey] did not drink around her, and she did not think that [Lackey] had a drinking problem.

Betty Edge testified that she was with [Lackey] for several hours prior to the murder of Kumph. Edge testified that at the time of the murder, she had known [Lackey] for almost six months. On the night of July 30, 1977, Edge and friends were at a small club in

Lubbock. [Lackey] arrived around midnight, at which time Edge considered him intoxicated. [Lackey] drank beer at another table until the bar closed at 2 a.m. At that time Edge, [Lackey], and four other persons continued on to an after hours club, where [Lackey] drank at most one more beer. The group stayed there less than an hour. Edge and [Lackey] were invited to the mobile home of their friends. They were at the mobile home for almost an hour, when Edge left to take one of the group home, and [Lackey] left to check on a friend. They ran into each other again outside the after hours club, and returned to the mobile home. Sometime later, [Lackey] removed all of his clothing, and Edge removed most of hers. Edge refused to engage in sex, and [Lackey] told her she was "a lady." [Lackey] did not appear angry and left shortly after 5 a.m.

Edge testified that [Lackey] was still intoxicated around 4 a.m., but appeared to be "sobering up" even though he continued to drink from midnight till after 4 a.m. She testified that she could not tell how many drinks [Lackey] had consumed between midnight and 2 a.m., but that [Lackey] might have had one beer at the after hours bar, and possibly two or three beers after that. [Lackey] was intoxicated, but at all times coherent and conversational.

Dr. Herbert Modlin, a general psychiatrist, psychoanalyst, and board certified neurologist, testified that he had examined [Lackey] for two hours and had read [Lackey's] past medical, psychiatric and psychological reports, and educational records. Modlin testified that [Lackey] had been psychologically tested as an adult, and at ages 7, 11, and 14; that [Lackey's] school record in academics was extremely poor, but that he had good marks for citizenship and art; that [Lackey's] IQ was 75 at age 7, 80 at age 11, 67 at age 14, which was mental retardation, and as an adult was probably in the 70-80 range; and that [Lackey] was "over controlled" and "somewhat inh[i]bited emotionally." In Modlin's opinion, [Lackey] did not fit any particular category

such as psychotic, impulsive personality, or anti-social personality.

Modlin, however, classified [Lackey] as a "periodic drinker." Although [Lackey] did not have a daily need for alcohol, "[t]he problem [was] that he often drank too much and it got out of hand, and he would have alcoholic blackouts." Modlin testified that [Lackey's] version of the events on the morning of Kumph's murder was consistent with an alcoholic blackout at the time of the murder. Modlin testified that [Lackey] recognized his alcohol problems, and that [Lackey] would probably not constitute a continuing threat to society.

The State presented evidence to refute [Lackey's] mitigating evidence and his claim of alcoholic blackout. Carrol Johnson Holmes, [Lackey's] girlfriend and roommate at the time of the murder, testified that when [Lackey] saw the news coverage of Kumpf's murder, he turned to her and said, "Baby, I've got to tell you something. I'm the one they're looking for."

Lackey v. State, 819 S.W.2d at 113, 115, 129-30.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Lackey advances no special or important reason in this case, and none exist. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II.

CERTIORARI SHOULD BE DENIED AS AN INAPPROPRIATE ATTEMPT TO AVOID THE ABUSE OF THE WRIT DOCTRINE.

Lackey claims that the state has forfeited its right to execute him due to the length of time he has been challenging his execution and the fact that he has previously faced three execution dates. This claim was clearly available to him at the time he filed his federal habeas petition, as all of the circumstances of which he complains had already occurred. Lackey should not be allowed to now circumvent the federal abuse of the writ doctrine by litigating claims in a petition for writ of certiorari to the state court that could have been advanced previously.

As Justice Stevens noted, concurring in the denial of an application for a stay in *Kyles v. Whitley*, 111 S. Ct. 333 (1990), "this Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims." This policy is especially appropriate in a case such as this where review of a constitutional claim rejected by the state courts would allow a petitioner to bypass the proper application of the abuse doctrine in federal habeas review. Given the "[s]tate's strong interest in proceeding with its judgment" in this case and Lackey's obvious attempt to manipulate the system by seeking certiorari review of a claim previously available to him when he filed his petition for federal habeas corpus, a stay is not justified. *See Gomez et al., v. United States District Court*, 112 U.S. 1652, 1653 (1992).

By seeking certiorari review of the state habeas decision, Lackey clearly seeks to bypass federal habeas review and the proper dismissal of his successive claim in that forum as an abuse of the writ pursuant to Rule 9(b), 28 U.S.C. fol. §

2254. Lackey should not be allowed to avoid the proper application of the abuse doctrine.

Rule 9(b), 28 U.S.C. fol. § 2254, provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new or different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

This provision applies with equal force to capital murder petitioners under sentence of death. *See McCleskey v. Zant*, 111 S. Ct. 1454 (1991); *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992). In fact, this Court has explicitly stressed its applicability.

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been brought years ago are brought forward--often in a piecemeal fashion--only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate--even in capital cases--this type of abuse of the writ of habeas corpus.

Woodard v. Hutchins, 464 U.S. 377, 380 (1984) (Powell, J., joined by Burger, C.J., Blackmun, Rehnquist, and O'Connor, JJ., concurring).

Lackey's attempt to litigate these successive claims would be foreclosed in federal habeas review. A federal habeas court may address the merits of a successive claim only if the prisoner supplements his constitutional challenge with a showing of actual innocence. *Kuhlman v. Wilson*, 477 U.S. 436, 454 (1986). Although Lackey claims that his claim would fall under the "fundamental miscarriage of justice" exception to the abuse of the writ doctrine, he does not claim, much less demonstrate, that he is actually innocent of the crime or the death penalty in the sense that "but for a constitutional error no reasonable juror would

have found him eligible for the death penalty." *Sawyer v. Whitley*, 112 S.Ct. at 2517. Thus, Lackey's claim does not come under the "narrow scope of the fundamental miscarriage of justice exception." *Id.* at 2519. *See also Dugger v. Adams*, 489 U.S. 401 (1989); *Smith v. Murray*, 477 U.S. 527 (1986). Lackey, therefore, cannot establish the prerequisite to his right to litigate these claims in a successive habeas petition. *See Schlup v. Delo*, 1995 WL 20524 (U.S.Mo.).

This Court should decline to exercise its certiorari jurisdiction where, as here, a defendant asks the Court to review the denial in state habeas review of a claim that would be foreclosed from federal habeas review by the abuse of the writ doctrine. Allowing a petitioner to deliberately bypass the proper application of the abuse doctrine in the manner attempted by Lackey would eviscerate the effectiveness of the abuse doctrine in preventing piecemeal litigation.

III.

LACKEY'S CLAIM WAS PROPERLY DENIED ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS; IN THE ALTERNATIVE, HIS EXECUTION DOES NOT VIOLATE THE EIGHTH AMENDMENT.

Lackey claims that the state has forfeited its right to execute him due to the length of time he has been challenging his execution and the fact that he has previously faced three execution dates. He claims that to carry out his sentence at this time would violate the Cruel and Unusual Clause of the Eighth Amendment. This claim is without merit.

A. This Court is without jurisdiction to review the state court's determination that Lackey's claim was not cognizable in a petition for postconviction writ of habeas corpus.

The Court of Criminal Appeals denied Lackey's claim because it is "not cognizable in a petition to determine the legality of his sentence or confinement" pursuant to the Texas habeas statute. *See* Trial Court's Findings of Fact and Conclusions of Law at 10. Consequently, this Court lacks jurisdiction to review the state court's determination that Lackey's claim that his execution is rendered unconstitutional due to the length of time between the assessment and imposition of sentence.

A state conviction and sentence are presumptively valid and final at the conclusion of the direct appeal process, which includes the right to petition this Court for a writ of certiorari if a federal question is involved. *Murrary v. Giarratano*, 492 U.S. 1, 9 (1989). By contrast, state habeas proceedings are not part of the criminal process nor required by the Constitution.

> A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.

Id. at 13 (O'Connor, J., concurring), *citing Pennsylvania v. Finley*, 481 U.S. 551 (1987). Thus, if the state courts are not constitutionally required to provide habeas corpus review, *a fortiori* the state courts are not constitutionally required to recognize particular types of claims.

Because the Texas courts have chosen to not recognize as a basis for habeas relief the type of claim Lackey raised there, this Court is without jurisdiction. The

cases are legion that the Court is without jurisdiction to review a question of federal law where the decision of the state court rests on a state law ground adequate and independent of the federal question. *Coleman v. Thompson*, 111 S.Ct. 2546, 2553-54 (1991); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *McCoy v. Shaw*, 277 U.S. 302 (1928); *Petrie v. Nampa Irrigation Dist.*, 248 U.S. 154, 157 (1918). "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman v. Thompson*, 111 S.Ct. at 2554, *citing Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). As the decision of the state court rests on adequate and independent state law grounds, this Court is without jurisdiction to review the claim.

B. In the alternative, the state court's decision was proper because Lackey's claim does not constitute cruel and unusual punishment.

The Court has interpreted the Cruel and Unusual Clause of the Eighth Amendment to prohibit "those modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted." *Ford v. Wainwright*, 477 U.S. 399, 405 (1986). In addition, the Court has interpreted the cruel and unusual clause to prohibit punishment that offends the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). In determining what standards have "evolved" the Court has looked to the standards of "modern American society as a whole." *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989).[3]

[3] This refers to *American* standards, not the standards of other countries. *Stanford v. Kentucky*, 492 U.S. at 369 n.1 (emphasis in original). Therefore, Lackey's substantial reliance on *Pratt & Morgan v. The Attorney General of Jamaica*, Privy Council Appeal No. 10 of 1993 (Nov. 2, 1993), as the guiding

See also Harmelin v. Michigan, 111 S.Ct. 2680, 2691-92 (1991). To this end, the Court looks toward "objective indicia that reflect the public attitude toward a given sanction", the "statutes passed by society's elected representatives." *Stanford v. Kentucky*, 492 U.S. at 370 (quotations and citations omitted). The "evolved standards" thus prohibits "particular forms or 'modes' of punishment--specifically, cruel methods of punishment that are not regularly or customarily employed." *Harmelin v. Michigan*, 111 S.Ct. at 2691. Lackey cannot demonstrate that his execution at this time would have been considered cruel and unusual at the time the Bill of Rights was adopted or that it would be a cruel method of punishment that is not regularly followed at this time.

Beginning with the latter standard first, Lackey cannot demonstrate that the delay occasioned while he pursues appeals and collateral relief is unusual by present standards. Due to the procedural safeguards in place, it is certainly not uncommon to take more than ten years to carry out a death sentence from the time of sentencing. *See, e.g., Sawyer v. Whitley*, 112 S.Ct. at 2517 (death sentenced petitioner pursuing appeals and collateral relief for 13 years); *McClesky v. Zant*, 111 S.Ct. 1454 (1991) (death sentenced petitioner pursuing appeals and collateral relief for 13 years); *Harris v. Pulley*, 493 U.S. 1051 (1990) (previous opinion of the Court, *Pulley v. Harris*, 465 U.S. 37 (1984), demonstrates death sentenced petitioner pursuing appeals and collateral relief for 13 years); *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (death sentenced petitioner pursuing appeals and collateral relief for 13 years); *Richmond v. Lewis*, 948 F.2d 1473 (9th Cir. 1990) (denying

standard of what constitutes cruel and unusual punishment is misplaced. Moreover, in *Pratt & Morgan*, in addition to being premised on a different constitution and legal system than in the United States, the court there fashioned a rule by which any execution that is to take place more than five years after the sentence is assessed is presumptively "'inhuman and degrading punishment or other treatment'" in violation of the constitution governing Jamaica. No reason is given for the arbitrary time period of five years; that is, no reason is given as to why an interval of four and one-half years would not be in violation of the constitution, but a delay of six or seven years would. Thus, for good reason, such arbitrary "constitutional" time limits in Jamaica are obviously not applicable under the United States Constitution.

claim that to execute death sentenced petitioner after pursuing appeals and collateral relief for 16 years is cruel and unusual), *rev'd on other grounds*, 113 S.Ct. 528 (1992) (conviction reversed without prejudice to state's right to seek another death sentence).

Moreover, most states with the death penalty provide for a mandatory appeal to the state's highest court. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 198 (1976) ("important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court."); *Pulley v. Harris*, 465 U.S. at 43 n.7 (Georgia statute *requiring* State Supreme Court to conduct proportionality review "much copied"). Substantial amounts of time spent in determining complex issues in important cases do not implicate constitutional guarantees. *Cf., Harrison v. United States*, 392 U.S. 219, 221 n.4 (1968) (delay of eight years between arrest and sentencing did not violate defendant's constitutional right to a speedy trial where the delay resulted from the need to assure careful review of an unusually complex case). Thus, a delay of over ten years between sentencing and the execution of the sentence is not unusual by present standards, nor is it unusual that a conviction and death sentence are automatically appealed to the State's highest court.

In addition, the fact that Lackey has previously had to prepare for an execution does not itself rise to the level of cruel and unusual punishment. The Court addressed a similar issue in *State of Louisiana ex rel. Francis v. Resweber, Sheriff, et al.*, 329 U.S. 459, 464 (1947).

> Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. *Even the fact that petitioner has already been subjected to a current of electricity*

> *does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.* . . . We cannot agree that the hardship imposed upon petitioner rises to the level of hardship denounced as denial of due process because of cruelty.

Id. at 464 (emphasis added). The mere fact that Lackey was able to block a previously scheduled execution through legal channels certainly does not give rise to a claim that the scheduling of that execution constitutes cruel and unusual punishment.

In the present case, no execution date was set until after Lackey's second conviction was affirmed in April of 1992--that is, no execution date was set while his appeal was pending before the Texas Court of Criminal Appeals.[4] Therefore, Lackey has spent less than three years with a pending execution. Moreover, his first conviction and death sentence was reversed, resulting in a new trial at which Lackey was presumed innocent of the crime and not under any sentence. His current death sentence was not assessed until April of 1983. *See Richmond v. Lewis*, 948 F.2d at 1491 (relevant period for assessing eighth amendment claim based on delay in carrying out sentence is time when sentence for which petitioner is presently under was imposed). Finally, as acknowledged by Lackey, Petition at 3, his case has involved highly complex issues, which could account for the length of time the courts have taken to resolve the challenges to his conviction. *Cf.*,

[4] In Texas, the trial court could not set an execution date while Lackey's appeal was pending. Tex. Code Crim. Proc. Ann. art. 42.04 ("When a defendant is sentenced to death, no date shall be set for the execution of sentence until after the receipt by the clerk of the trial court of the mandate of affirmance of the court of criminal appeals."). After the Court of Criminal Appeals issued its mandate, the trial court could set an execution date, but it could not set the date within thirty days of its order. Tex. Code Crim. Proc. Ann. art. 43.14. In this case, the trial court took no action on Lackey's case for approximately five months after his conviction became final. Then, the trial court scheduled his execution for approximately three months in advance, which, of course, was modified twice at Lackey's request.

Harrison v. United States, 392 U.S. at 221 n.4. During this time--and, in fact, not until all other avenues of attack upon his conviction and sentence have ended and his execution was little more than one week away--Lackey never once complained about the slow pace of the resolution of his claims or even inquired as to the time being devoted to the task. On the contrary, Lackey, as is apparent from his manner of proceeding, was content with delaying the ultimate resolution of his case for as long as possible. *See* Statement of Case, *supra*.

After the Court of Criminal Appeals affirmed his conviction and the time had expired for him to file a petition for writ of certiorari, the trial court, in April 1992, scheduled his first execution date. Lackey, on three occasions, requested modifications of his execution so he could pursue collateral relief in state court. The first two requests were granted. Thus, the fact that he has previously faced three execution dates was of his own making. Moreover, only his attorneys can be faulted for waiting until the last minute to file requests for modifications or his habeas applications in order to obtain a last-minute stay.[5]

[5] Lackey seems to argue that he is *required* to file an application for habeas relief and that it is a requirement that he face imminent execution before he is allowed to do so. Of course, he is not required to file a habeas application, and the state is not required to wait until collateral relief is completed before it may go forward with the execution of a presumptively valid conviction and sentence. *See Murray v. Giarratano*, 492 U.S. 1 (1989). Additionally, there is no requirement that he wait until his execution is imminent, or that he even have an execution date, before filing a state or federal habeas application. Tex. Code Crim. Proc. Ann. art. 11.01 *et seq.* However, as is customary for capital litigants today, nothing is filed until an execution date becomes imminent in order to create an emergency which the inmate believes will entitle the inmate to a stay of execution. In this way, the inmate seeks to prolong the process as long as possible.

In fact, Lackey's last-minute litigation at this stage is another case in point. This claim is essentially identical to the issue raised by the same attorney (Brent Newton with the Texas Resource Center) representing Lackey in *Calvin Jerold Burdine v. Texas*, No. 94-7623 (*cert. denied* February 21, 1995). Despite all of the legal work (as well as all factual allegations) being completed approximately one month ago, Lackey has chosen to wait until there is little more than one week before his scheduled execution to initiate habeas proceedings in state court. Thus, even at the moment that he is complaining that the delay in carrying out his sentence entitles him to relief he is nonetheless engaged in a game of high-stakes brinksmanship in order to create yet another delay.

Lackey also cannot demonstrate that the delay occasioned by his pursuit of appeals and collateral relief would have been considered cruel and unusual punishment at the time the Bill of Rights was adopted. While Lackey may accurately claim that a death sentence would not have taken near the amount of time as it does presently for it to have been carried out, he in no manner demonstrates that the speed with which executions were carried out at the time the Bill of Rights was adopted was due to the concern over what was cruel and unusual to the condemned. *See Pratt & Morgan*, slip op. at 2 (discussing swiftness of carrying out executions in eighteenth- and nineteenth-century England, but not discussing reasons). Contrary to Lackey's assertions, the procedures to which Lackey has been subject, which has allowed him to attack his conviction on direct appeal (once successfully) and in collateral proceedings, exhausting every imaginable claim at the expense of the state,[6] are quiet generous by the standards employed at the time the Bill of Rights was adopted when counsel was not required to be appointed at the time of trial, much less on collateral review.

Finally, as recognized in *Richmond v. Lewis*, 948 F.2d at 1491-92, to allow death-sentenced inmates, who have the most complex issues on appeal and lawyers most skillful at dilatory tactics, to avoid a death sentence due to the delay thus created would itself be arbitrary and capricious and, therefore, unconstitutional. *See Furman v. Georgia*, 408 U.S. 238 (1972). *Richmond v. Lewis* bears quoting in this respect.

[6] Of course, Lackey never faced imminent execution while he pursued his direct appeal and was granted generous allowances of time in which to assert collateral remedies, if he so chose, after his conviction was affirmed.

> It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, death-row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates--less successful in their attempts to delay--would be forced to face their sentences. Such differential treatment would be far more "arbitrary and unfair" and "cruel and unusual" than the current system of fulfilling sentences when the last line of appeals fails on the merits.

Richmond v. Lewis, 948 F.2d at 1473. No reason exists to allow death sentenced inmates to benefit from the unsuccessful pursuit of appeals.

IV.

LACKEY HAS NOT SATISFIED THE STANDARD FOR OBTAINING A STAY OF EXECUTION.

In deciding whether to grant a stay of execution, the Court is guided by the following standard:

> "'[T]here must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.'"

Barefoot v. Estelle, 463 U.S. 880, 895-96 (1983), quoting *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers) (quoting *Times-Picayune Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974)). Because it is clear that the court below correctly resolved the issues presented and that their resolution only

involved the application of well-established precedent to the facts of this case, the jurisdictional prerequisite for certiorari review is lacking.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the petition for writ of certiorari and stay of execution be denied.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

MAR 2 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CLARENCE ALLEN LACKEY

Petitioner,

v.

STATE OF TEXAS

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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ORIGINAL QUESTION PRESENTED

(1) Whether the execution of a death sentence constitutes cruel and unusual punishment under the Eighth Amendment as understood by the Framers if, as a result of inordinate delay not attributable to his own conduct, the condemned inmate is forced to endure nearly two decades on death row, during which time his execution is repeatedly rescheduled.

SUPPLEMENTAL QUESTIONS PRESENTED

(2) (a) Whether the Texas courts unambiguously invoked the Texas "abuse of the writ" doctrine as an independent and adequate state law ground for decision in this case.

(b) Assuming that the Texas courts unambiguously invoked the Texas "abuse of the writ" doctrine, whether that state procedural ground is applied with sufficient consistency to preclude federal review in this Court.

(3) Whether the Texas courts' holding that Petitioner's Eighth Amendment challenge to his death sentence was not "cognizable" on state habeas review is an independent and adequate state law ground for decision barring this Court's review.

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No. 94-8262

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CLARENCE ALLEN LACKEY,

Petitioner,

v.

STATE OF TEXAS

Respondent.

Petitioner Clarence submits this Supplement to his previously lodged certiorari petition.

ADDITIONAL REASONS WHY THIS COURT SHOULD GRANT CERTIORARI

I.

THE TRIAL COURT'S SUGGESTION TO THE TEXAS COURT OF CRIMINAL APPEALS THAT TEXAS' ABUSE-OF-THE-WRIT DOCTRINE SHOULD PERHAPS BE INVOKED IN THIS CASE -- AND THE STATE HIGH COURT'S FAILURE TO ACT ON THAT SUGGESTION -- DOES NOT QUALIFY AS A "PLAIN STATEMENT" INVOKING AN INDEPENDENT AND ADEQUATE STATE LAW GROUND UNDER HARRIS V. REED, 489 U.S. 255 (1989).

In its proposed findings of fact and conclusions of law, the state habeas trial court *suggested* to the Court of Criminal Appeals that *perhaps* Petitioner's second state habeas application should be procedurally barred under the Texas abuse-of-the-writ doctrine. See Ex Parte Lackey, No. 18,075-B, *Findings of Fact and Conclusions of Law*, at 5-6 (137th Dist. Ct. Lubbock County

March 1, 1995) ("The Court of Criminal Appeals has recognized the doctrine of 'abuse of the writ' and [has] held that an applicant may waive and abandon his allegations by the repetitious filing of [state habeas] applications. [citation omitted]. ... In the instant case, Applicant persists in raising repetitious applications continue [sic] to lack merit without explaining why he could not have brought his complaints in his initial writ applications.[1] His abuse of the state writ process may procedurally bar and foreclose the issue. Regardless, [addressing the merits] ...") (emphasis added) (**attached as Appendix A**).

The Texas Court of Criminal Appeals issued its traditional one-page boilerplate order denying habeas relief, which stated:

> In the instant case, applicant presents a single allegation in which he challenges the constitutionality of proceeding with his execution. The trial court has entered findings of fact and conclusions of law and recommended the relief sought be denied. This Court has reviewed the record. *The findings and conclusions entered by the trial court are supported by the record and upon such basis the relief sought is denied.*

Ex Parte Lackey, Writ No. 24,267-02 (Tex.Crim.App. March 1, 1995) (emphasis added) (attached hereto as **Appendix B**).

Looking at both the trial court's proposed findings of fact and conclusions of law and the Court of Criminal Appeals' order adopting them -- which failed to mention the trial court's suggestion that relief perhaps be denied on state abuse-of-the-

[1] The trial court's reference to "applications" was obviously an error. Petitioner filed only *one* previous state habeas application (in 1992).

writ grounds -- there is an obvious ambiguity in the state courts' orders regarding whether the state abuse-of-the-writ doctrine was being invoked as an independent and adequate state law ground. The trial court's use of the term "*may*" -- suggesting a possible course of action to the appellate court but not itself taking that course of action -- and the Court of Criminal's issuance of a boilerplate order that failed to mention the trial court's reference to the abuse doctrine create the very type of ambiguity that requires this Court to presume that relief was denied on the merits. See Harris v. Reed, 489 U.S. 255 (1989).

II.

ASSUMING *ARGUENDO* THAT THE TEXAS COURTS' INTENDED TO DENY RELIEF ON STATE ABUSE-OF-THE-WRIT GROUNDS, THIS COURT CANNOT TREAT A TEXAS ABUSE FINDING AS AN INDEPENDENT AND *ADEQUATE* STATE LAW GROUND.

Federal habeas review of the merits of a constitutional claim may be barred when a state court has previously held that the habeas petitioner has failed to comply with a state procedural default rule that qualifies as an "independent and adequate state law ground." See Wainwright v. Sykes, 433 U.S. 72 (1977). Whether such a procedural default is an independent and adequate state law ground is a federal question reviewed *de novo* by the federal courts. Johnson v. Mississippi, 486 U.S. 578, 587 (1988). A state procedural rule is "adequate" only if it represents a "firmly established and regularly followed state practice." James v. Kentucky, 466 U.S. 341, 348-49 (1984); see

also Johnson v. Mississippi, 486 U.S. at 587 ("A state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'") (citations omitted).

The great weight of Texas case law demonstrates that the Texas abuse-of-the-writ doctrine is not a consistently-applied independent and adequate state law ground -- as counsel for Respondent, the Texas Attorney General's Office, has twice conceded in two other recent cases. See **Appendix C** (copies of pleadings in which the Attorney General recently conceded that the Texas abuse doctrine is not an adequate state law ground).

The Court of Criminal Appeals' abuse of the writ "rule" is neither regularly followed nor firmly established. No consistency can be found either as to the number of state habeas applications an inmate may file before being cited with abuse of the writ, the reasons for which the Court of Criminal Appeals will invoke the abuse rule, or the grounds on which it will find "good cause" to permit an additional application to be filed notwithstanding an abuse finding. Perhaps most important, the Court of Criminal Appeals itself, within the last year, has acknowledged in a published opinion the continuing uncertainty about the scope and definition of Texas' purported abuse of the writ doctrine. See Ex Parte Barber, 879 S.W.2d 889 (Tex.Crim.App. 1994) (discussed infra). Under such circumstances, the federal courts cannot fairly conclude that Texas' abuse of the writ rule constitutes a regularly followed and firmly established procedure that may federal habeas relief.

Accordingly, this Court should grant certiorari in order to address this important issue, which potentially affects countless Texas criminal defendants.

A. Texas' abuse of the writ rule is not an "adequate" state law ground because the procedural rule is inconsistently applied.

No articulated rule limits the number of post-conviction applications a Texas prisoner may file before he may be found to have "abused the writ" by the state courts. As John Jasuta, Chief Staff Attorney for the Texas Court of Criminal Appeals, has publicly stated, "[t]here is no general rule governing how many applications constitute an abuse of the writ process" under Texas law.[2] Indeed, the caselaw on Texas' abuse of the writ doctrine is quite sparse.[3]

The Texas Court of Criminal Appeals has on rare occasion found that a state habeas petitioner abused the writ after having filed one, two, or three successive habeas petitions;[4] in other

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[2] See Post Conviction Remedies Pursuant to Article 11.07 [of the Texas Code of Criminal Procedure], "Procedures in Abuse Cases within the Court," (excerpt) at 13, presented at the Advanced Criminal Law Seminar 1990 sponsored by the State Bar of Texas (1990) (**attached hereto as Appendix D**).

[3] Computerized research reveals that there are less than a dozen cases available on the LEXIS legal database in which the Texas Court of Criminal Appeals has mentioned its abuse of the writ doctrine. The doctrine is rarely invoked.

[4] See, e.g., Ex Parte Carr, 511 S.W.2d 523 (Tex.Crim.App. 1974) (citing habeas petitioner with abuse of the writ on second habeas application); [Ex Parte] Bright, No. 10,968-04, unpublished order (Tex.Crim.App. April 10, 1985) (**available on LEXIS**) (citing habeas petitioner with abuse of the writ on fourth habeas application); [Ex Parte] Robinson, No. 14,031-03, unpublished order (Tex. Crim. App. April 24, 1985) (**available on**
(continued...)

cases, however, the same court has waited to impose an abuse of the writ sanction until after many more successive habeas applications (over ten in some cases) have been filed and rejected on the merits.[5]

In numerous other cases, the Texas Court of Criminal Appeals has permitted numerous applications to be filed by a single habeas petitioner without invoking the abuse of the writ bar, even when the trial court has recommended that the applicant be cited for abuse.[6] See generally *Affidavit of Troy Bennett, ¶ 5*

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[4](...continued)
LEXIS) (citing habeas petitioner with abuse of the writ on third habeas application); Ex Parte Motley, Writ No. 23,806-03, unpublished order (Tex. Crim.App. Feb. 6, 1995) (citing habeas petitioner with abuse of the writ on third habeas application); see also Ex Parte Barber, 879 S.W.2d 889, 891 n.1 (Tex.Crim.App. 1994) (suggesting in obiter dicta that a state habeas applicant should ordinarily be held in abuse of the writ on a second habeas application raising an issue that could have been raised in the first application).

[5] See, e.g., Ex Parte Stuart, 653 S.W.2d 13, 13-14 (Tex. Crim. App. 1983) (noting that the habeas applicant was cited with abuse only after filing over ten prior habeas applications that were rejected on the merits); Ex Parte Choice, 828 S.W.2d 5, 5 n.1 (Tex.Crim.App. 1992) (noting that the habeas applicant was previously cited with abuse after filing six habeas petitions that were rejected on the merits). Notably, in Stewart, on the petitioner's twelfth state habeas appeal, the Texas Court of Criminal Appeals waived the abuse bar and addressed the merits of his claim -- thus, further demonstrating the inconsistent application of the state court abuse doctrine. See Stewart, 653 S.W.2d at 13-14. Likewise, in Choice, the Texas Court of Criminal Appeals cited the habeas petitioner with abuse of the writ on his seventh state habeas appeal, but then waived the abuse doctrine on the petitioner's eighth state habeas appeal.

[6] See, e.g., Ex Parte Bell, No. 70,949, unpublished order (Tex.Crim. App. November 6, 1991) (despite trial court's recommendation that Bell be cited for abuse on third application for habeas relief, appellate court granted habeas relief on the ground that jury could not consider evidence of mental
(continued...)

(Chief Clerk of the Texas Court of Criminal Appeals) (noting recent examples of state habeas applicants filing successive petitions not subject to abuse of the writ sanction) (attached hereto as **Appendix E**). It is apparent that the Texas abuse of the writ doctrine has been applied (or, more commonly, waived or ignored) without any rhyme or reason. As noted, counsel for Respondent herein, the Texas Attorney General, has recently made this concession in two other Texas federal habeas cases. See **Appendix C**.

Perhaps the most compelling evidence that there is no firmly established and regularly followed abuse of the writ rule under Texas law is the 1994 decision in Ex Parte Barber, 879 S.W.2d 889 (Tex. Crim. App. 1994). In Barber, the Texas Court of Criminal Appeals suggested that a clearly-announced, consistently-applied state court abuse of the writ doctrine would be a sound policy *in the future*, but declined to announce such an abuse doctrine in that case. See id. at 891 n.1 ("*It may well be* that in order to reduce the unnecessary waste of time and expenses to the court system incurred by numerous applications for writs of habeas corpus, *this Court should consider* refusing to hear writs that raise points of error that were available when the first writ was filed ....") (emphasis added). Judge Meyer's

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[6](...continued)
retardation); Ex Parte Ellis, Writ No. 17,233-03, unpublished order (Tex. Crim. App. 1992) (relief denied on third habeas application; no abuse finding made despite recommendation of same by trial court); Ex Parte Callins, Writ No. 21,422-04, unpublished order (Tex.Crim.App. Feb. 18, 1994) (relief denied on fourth state habeas application; no abuse finding).

concurrence in Barber offers further proof that there is no consistently applied abuse of the writ doctrine in the Texas courts: "Although I too am eager for *comprehensive changes* in Texas habeas corpus practice, and might ultimately favor many of the *suggestions* made gratuitously by the Court here, I invite the bench and bar to discount the *obiter dicta* of this case. [It is] superfluous in the present context ..., since it purports to decide *a question of first impression in Texas criminal jurisprudence* without the benefit of briefing or oral argument." Id. at 892 (emphasis added).

Although a handful of Texas cases have purported to apply an abuse of the writ doctrine in the past decade, such cases are the exception rather than the rule, as Ex Parte Barber, supra, clearly demonstrates. Barber thus provides strong evidence that Petitioner violated no regularly and strictly applied rule prohibiting abuse of the writ in state court.

The relevance of Barber to the question of the adequacy of Texas' abuse of the writ rule is illustrated by Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994). Siripongs, a death row inmate, unsuccessfully sought state habeas relief in the California courts. He then proceeded to federal court, filing a "mixed petition" that raised numerous challenges to his conviction and sentence, including some which had not been presented to the state courts. He was permitted to return to state court and file a second petition raising the non-exhausted claims; the California courts denied his second petition as an

abuse of the writ under state law. The federal district court concluded that this finding amounted to an independent and adequate procedural bar to the consideration of some of Siripongs' claims. Id. at 1316-18.

On appeal, the Ninth Circuit observed that the California Supreme Court, some time after denying Siripongs' second petition, had issued an opinion in another case discussing in detail the uncertainty that previously had surrounded the application of California's abuse of the writ doctrine in state habeas proceedings. Id. at 1318, citing In Re Clark, 855 P.2d 729 (Cal. 1993). In considering whether the state court abuse of the writ finding as to Siripongs' second state habeas petition was an adequate and independent bar to federal review, the Ninth Circuit noted that although "subsequent petitions in California had, prior to Clark, never been condoned by the California courts, they clearly were often permitted as a matter of discretion." Id. at 1318. California's failure to apply its state "abuse of the writ" doctrine consistently, as illustrated by Clark's acknowledgment of that prior practice, compelled the conclusion that this rule was not "the type of independent and adequate state ground that precludes federal review." Id.

The parallel of Clark to the Texas Court of Criminal Appeals' ruminations in Barber is compelling. As noted supra, no recognized rule limits the number of post-conviction applications a Texas prisoner may file before he might be found to have "abused the writ," and no regularly applied rule requires Texas

prisoners to raise issues on direct appeal before raising them in state habeas corpus proceedings. This practice demonstrates that, at the time Petitioner sought state review of his claims of federal error, such applications for relief under Art. 11.07 "clearly were often permitted as a matter of discretion." Siripongs, 35 F.3d at 1318. Accordingly, as in Siripongs, the federal courts in this case may not defer to the imposition of such a inadequate procedural bar to block federal review of the merits of any of Petitioner's claims.

As the Ninth Circuit in Siripongs looked to the California Supreme Court's recent opinion in Clark for evidence that no firmly settled and regularly applied doctrine of "abuse of the writ" had been applied to Siripongs' second petition, the Fifth Circuit should have examined Barber, which compels the same conclusion in this case. The speculative tone of the Court of Criminal Appeals' discussion of Texas' abuse of the writ doctrine in Barber, like the California Supreme Court's candid acknowledgment of the prior inconsistent application of its own abuse of the writ doctrine in Clark, is critically relevant evidence that the federal courts may not ignore in determining whether the Texas abuse of the writ doctrine is an adequate state law ground. The reasoning of Siripongs plainly applies to this situation, and just as plainly requires the lower courts to address the merits of Petitioner's claim notwithstanding the state court's talismanic invocation of abuse of the writ. See also Bransford v. Brown, 806 F.2d 83, 84-85 (6th Cir. 1986) (fact

that Michigan had no recognized rule limiting the number of appeals meant that no adequate procedural bar could exist on this basis), cert. denied, 481 U.S. 1056 (1987).

C. The Texas abuse of the writ doctrine is not an "adequate" state law ground because it is an inherently discretionary procedural rule.

The above-cited Texas habeas cases reveal that the Court of Criminal Appeals' abuse of the writ doctrine is an inherently *discretionary* rule, which the state court may invoke, or decline to invoke, at its whim, unguided by any articulated standards.

Such an irreducibly discretionary rule cannot constitute an "adequate" state law ground to bar federal habeas review.[7] Numerous lower federal courts have in recent years held that a purely discretionary state court procedural rule can never be an adequate state law ground.[8]

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[7] See Williams v. Georgia, 349 U.S. 375, 389 (1955); see also Sullivan v. Little Hunting Park, 396 U.S. 229, 233-34 (1969) (party's violation of state court procedural rule "more properly deemed discretionary than jurisdictional" does not bar federal review as an independent and adequate state law ground); Taylor v. Illinois, 484 U.S. 400, 421 (1988) (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting on other grounds) ("[I]t is well established that where a state court possesses the power to disregard a procedural default in exceptional cases, the state court's failure to exercise that power in particular cases does not bar review by this Court.") (citing cases); Coleman v. Thompson, 111 S. Ct. 2546, 2569 (1991) (White, J., concurring) ("The predicate for [the petitioner's] argument is that on occasion the Virginia Supreme Court waives the untimeliness of the [procedural] rule. If that were true, the rule would not be an adequate and independent state law ground barring ... habeas review.").

[8] See, e.g., Gutierrez v. Moriarty, 922 F.2d 1464, 1469 (10th Cir. 1991) ("When assessing the adequacy of the New Mexico (continued...)

D. Texas' abuse of the writ rule fails as an "adequate" state law ground because the Texas court arbitrarily applies its own exceptions to the "rule."

In addition to the plainly discretionary character of Texas' inconsistently-applied abuse of the writ rule, the contours of that "rule" itself -- that is, the circumstances in which it may be expected to apply -- are so unclear that the "rule" cannot bar federal habeas review of a state prisoner's constitutional claims. The reasons the Court of Criminal Appeals has articulated for invoking its abuse "rule" are varied, and are applied haphazardly and arbitrarily. For instance, in Ex Parte Emmons, 660 S.W.2d 106 (Tex. Crim. App. 1980), the state court cited the habeas applicant for abuse on his first application because he had apparently committed perjury in his application. Id. at 107-110. In Ex Parte Carr, 511 S.W.2d 523 (Tex. Crim. App. 1974), the court applied the abuse rule because the applicant, on second state habeas appeal, raised grounds that were apparently deliberately withheld during his first state

[8](...continued)
procedural bar rule, we must therefore recognize that the New Mexico state courts have expressly reserved their unfettered discretion to waive the [procedural rule]. This circumstance argues against the conclusion that the courts apply the rule regularly and evenhandledly."); Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992) ("A procedural default rule is ... not 'adequate' if ... the procedural rule appears discretionary."); Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994) ("... the procedural bars the State relied on are discretionary and have not been applied consistently.... We have recognized that such a state procedural rule cannot act as a bar to federal review."); Karis v. Vasquez, 828 F. Supp. 1449, 1461 (E.D. Cal. 1993) ("The Supreme Court has ... held that a discretionary state [procedural] rule cannot bar federal review.") (citing cases).

habeas appeal. Id. at 524-26.

In certain circumstances, upon a showing of "good cause," the Texas court has permitted a successive habeas application to be filed even after the applicant has been cited for abuse of the writ in prior cases.[9] What constitutes a showing of "good cause" is as inconsistently applied by the state court as the initial finding of abuse is arbitrarily made. Despite the Court of Criminal Appeals' recognition that "good cause" is shown when an application raises claims based on a change in the law, see Ex Parte Bilton, 602 S.W.2d 534 (Tex. Crim. App. 1980); see also Stuart, supra, even that exception to the rule is arbitrarily applied.[10] Indeed, in this case, Petitioner contended in his *Objections to the Trial Court's Findings of Fact and Conclusions of Law*[11] that his Eighth Amendment claim was rooted in a November

[9] See, e.g., Ex Parte Choice, 828 S.W.2d 5, 5 n.1 (Tex.Crim.App. 1992); Ex Parte Dora, 458 S.W.2d 392 (Tex. Crim. App. 1977); Ex Parte Stuart, 653 S.W.2d 13 (Tex. Crim. App. 1983).

[10] At least one Texas prisoner has been cited for "abuse of the writ" after filing a habeas application raising claims based on this Court's decision in Penry v. Lynaugh, 492 U.S. 302 (1989). See Ex Parte Hogue, No. 16,907-05, unpublished order (Tex. Crim. App. September 18, 1991). Because the Court of Criminal Appeals has elsewhere admitted that the 1989 decision in Penry created a "right not previously recognized" in Texas, see Black v. State, 816 S.W.2d 350, 374 (Tex. Crim. App. 1991) (opinion of Campbell, J., for a majority of the court). its refusal to hear the applicant's Penry claim in Hogue clearly illustrates the arbitrary character of the Texas abuse of the writ doctrine. Such unreasonable results cannot satisfy the federal requirement that the state procedural rule be a "firmly established and regularly followed state practice." James v. Kentucky, 466 U.S. at 348.

[11] A copy of that pleading has previously been faxed to this
(continued...)

1993 decision of the British Privy Council which was not decided until long after his first state habeas appeal was over in late 1992.

In conclusion, the above analysis clearly demonstrates that the Texas Court of Criminal Appeals has no standard for determining when an applicant's successive filing of habeas applications constitute an abuse of the writ. The Texas court's insistence on holding Petitioner to standards not enforced against similarly situated state habeas applicants is manifestly arbitrary and unfair. Because Texas does not enforce this purported procedural default rule regularly or strictly in all cases, it is not an *adequate* ground for decision to which the federal courts must defer. On the contrary, because the state court's abuse ruling -- if in fact one was unambiguously made -- is not supported by an adequate state ground, this Court is free to address the merits of Petitioner's Eighth Amendment claim.

III.

THE TEXAS COURTS' HOLDING THAT PETITIONER'S EIGHTH AMENDMENT WAS "NON-COGNIZABLE" IN A STATE HABEAS CORPUS PROCEEDING IS NOT AN *INDEPENDENT* AND ADEQUATE STATE LAW GROUND.

The state trial court held that the Eighth Amendment claim raised in the courts below was not "cognizable" in a state habeas corpus proceeding filed pursuant to TEX. CODE CRIM. PRO. Art. 11.07. See *Findings of Fact and Conclusions of Law*, at 10

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[11](...continued)
Court.

("Applicant's claim is not cognizable in a petition to determine the legality of his sentence or confinement and does not rise to the level of denial of due process pursuant to the eighth amendment [to] the United States Constitution ...."). As noted, the Court of Criminal Appeals adopted the trial court's findings and conclusions *in toto* in a boilerplate order.

The trial court's legal conclusion is erroneous as a matter of well-established Texas law and, moreover, is not an *independent* and adequate state law ground. Petitioner's state habeas application relied on a great deal of legal authority -- both American and English cases -- that holds that it would constitute "cruel and unusual punishment" to carry out a death sentence after an inordinate delay and the setting of repeated execution dates. The claim, thus, directly implicates the Eighth Amendment. It attacks both the current legality of Petitioner's death sentence and the State's right to keep Petitioner on Texas' death row and does so on federal constitutional grounds. Thus, it is cognizable in an Art. 11.07 habeas corpus proceeding under well-established Texas precedent. See, e.g., Ex Parte McKay, 819 S.W.2d 478, 481 (Tex.Crim.App. 1990) (all federal constitutional claims are cognizable in Art. 11.07 habeas corpus proceedings); Ex Parte Banks, 769 S.W.2d 539, 540 (Tex.Crim.App. 1989) (same).

The Texas courts' denial of state habeas relief on "non-cognizability" grounds is not an independent and adequate state law ground precluding federal review because the *threshold* issue in the Texas courts' determination of whether Petitioner's

allegations "rose to the level" of a federal constitutional violation was itself a pure federal question. Thus, because federal law was intertwined with the Texas courts' determination of what is and what is not "cognizable" on Art. 11.07 state habeas review, the Texas courts' holding that Petitioner's Eighth Amendment claim was not "cognizable" is not an *independent* state law ground. See Ake v. Oklahoma, 470 U.S. 68 (1985).

IV.

IF THERE IS ANY QUESTION ABOUT THIS COURT'S JURISDICTION TO GRANT CERTIORARI IN THIS CASE, PETITIONER REQUESTS THAT THIS COURT TREAT HIS CERTIORARI PETITION AS AN ORIGINAL APPLICATION FOR WRIT OF HABEAS CORPUS FILED IN THIS COURT.

Although Petitioner believes that the above discussion amply demonstrates that this Court may properly exercise its certiorari jurisdiction over the important Eighth Amendment claim raised in the certiorari petition, Petitioner requests that, if this Court has any doubt about its jurisdiction, the Court treat the petition as an original application for writ of habeas corpus filed in this Court. See 28 U.S.C. § 2241(d) ("writs of habeas corpus may be granted by the Supreme Court [or] any justice thereof ....."). Under the special circumstances presented in this case, such an exercise of that original habeas corpus jurisdiction would be appropriate.

Petitioner has satisfied all of the requirements for filing an original habeas corpus application in this Court. In particular, he has fully exhausted his remedies in the Texas

courts. See Mooney v. Holohan, 294 U.S. 103, 115 (1935); see generally Robert L. Stern et al., SUPREME COURT PRACTICE, § 11.3, at 508-09 (6th ed. 1986). Furthermore, as explained in the certiorari petition previously lodged with this Court, it is unnecessary to require Petitioner to file a successive federal habeas corpus petition raising his Eighth Amendment claim. See *Cert. Pet.*, at 25-27. Because the operative facts in this case are undisputed -- in particular, the inordinate delay on the part if the State of Texas -- there is no need for additional factual development. Thus, this Court may appropriately hear the case in its present procedural posture.[12]

[12] If this Court believes that further factual development is necessary, Petitioner requests that this Court stay his imminent execution and transfer this case -- if treated as an original application for writ of habeas corpus -- to the U.S. District Court for the Northern District of Texas. See 28 U.S.C. § 2241(b). As explained in the certiorari petition, the federal abuse of the writ doctrine would not bar such a successive federal habeas petition since Petitioner is asserting that he is constitutionally *ineligible* to be executed.

CONCLUSION

In order to address the many important Eighth Amendment issues raised by this petition, this Court should grant certiorari and stay Petitioner's imminent execution.

Respectfully submitted,

Robert C. Owen by express permission BBR. Newton

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APPENDIX A

FILED
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DISTRICT CLERK
BY

No. 18,075-B

EX PARTE:	§	**IN THE 137TH DISTRICT COURT**
	§	**OF**
CLARENCE ALLEN LACKEY	§	**LUBBOCK COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Applicant, Clarence Allen Lackey, was convicted for the second time in this case by a jury of the offense of Capital Murder on April 15, 1983, and pursuant to the affirmative findings of the jury to the special issues, punishment was assessed by this Court at death.

Direct Appeal

Applicant then directly appealed to the Court of Criminal Appeals of Texas, which affirmed the conviction and sentence on June 14, 1989. *Lackey v. State,* 816 S.W.2d 392 (Tex.Crim.App. 1989). Following the Supreme Court's decision in *Penry v. Lynaugh,* 492 U.S. 302 (1989), the Court of Criminal Appeals granted rehearing. After supplemental briefing and argument, the Court affirmed Applicant's sentence on May 29, 1991. *Lackey v. State,* 819 S.W.2d 111 (Tex.Crim.App. 1991). Applicant's second motion for rehearing was denied on September 25, 1991. Because Applicant did not seek certiorari review, his conviction became final on December 24, 1991, upon expiration of

the time for filing a petition for writ of certiorari.

First State Habeas Action

No action was taken in the case by Applicant until four months later when this Court, on April 17, 1992, conducted a hearing prior to setting an execution date. On April 28, 1992, an order scheduling Applicant's execution for July 17, 1992, was entered. On July 9, 1992, the Court permitted Applicant to substitute counsel, and on July 13, 1992, substitute counsel requested that the execution date be modified so that an investigation could be conducted and claims presented in a state habeas application. That motion was granted the same day and the execution date rescheduled for October 17, 1992. On September 17, 1992, Applicant again requested that the execution date be modified, and the request was again granted. Applicant's execution was subsequently set for December 17, 1992. On December 3, 1992, this Court held a hearing on four motions filed by Applicant: a motion for discovery, which was denied; a motion for funds for experts, which was denied; a motion, to transcribe Applicant's second competency hearing, which was granted; and a motion to modify the execution date, which was denied. On December 11, 1992, less than six days prior to the scheduled execution, Applicant finally filed a state habeas application. At 9:00 a.m. on December 16, 1992, this Court entered findings of fact and conclusions of law and recommended that relief be denied. The Court of Criminal Appeals adopted the findings and denied relief at approximately 2:30 p.m. on December 16, 1992. *Ex parte Lackey,* No. 24,267-01 (Tex.Crim.App. Dec. 16, 1992).

First Federal Habeas Action

Applicant then filed a federal habeas petition and request for a stay of execution in the United States District Court for the Western District of Texas, Midland-Odessa Division. The district court granted the stay at 4:27 p.m. on December 16, 1992. The Director responded on January 12, 1993. After conducting an evidentiary hearing and receiving post-hearing briefing, the district court denied federal habeas relief, but granted a certificate of probable cause to appeal.

Applicant appealed the federal district court's denial of habeas relief to the Fifth Circuit Court of Appeals. The Fifth Circuit initially set the case for oral argument, but after receiving supplemental briefing from both parties, issued its opinion affirming the district court's denial of habeas relief without argument. *Lackey v. Scott*, 28 F.3d 486 (5th Cir. 1994). Applicant then filed a petitioned for writ of certiorari in the United States Supreme Court, which was denied on January 9, 1995. *Lackey v. Scott*, 115 S.Ct. 743 (1995). On February 2, 1995, this Court scheduled Applicant's execution for March 6, 1995. Applicant filed the instant application for writ of habeas corpus on February 23, 1995.

QUESTION RAISED IN PETITION

Applicant has raised a single issue in his application regarding the constitutionality of his pending sentence of death due to the duration of time he has spent on death row.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Initially it is important to note that while Applicant has been on death row for a period of approximately twelve years since the date of his second trial, an execution date was not set until April 28, 1992. Consequently, the amount of time that Applicant has actually spent with a pending execution date is less than three years.

Applicant has alleged that the State of Texas has forfeited its right to execute him, pursuant to the eighth and fourteenth amendments of the United States Constitution and to Article 1, section 13 of the Texas Constitution, because of torture to which the State has allegedly subjected him. Specifically, Applicant contends that the forfeiture of the State's right to execute him has resulted, "both from the inordinate amount of time that [Applicant] has spent on Texas' death row and the State's unnecessary setting of repeated execution dates in this case." (Application at 8). According to Applicant his stay on death row has been "filled with severe stress, depression and anxiety.... I became very ill -- emotionally and physically..." and that there have been, "countless times that I have been unable to eat or sleep because of the never-ending stress that I have felt." (Affidavit of Clarence Lackey).

Nevertheless, the reality of the situation is remarkably incongruent with these claims. The record shows that out of four execution dates that have been scheduled, two directly resulted from requests from *Applicant's attorneys* who alleged that they needed more time to prepare a writ application. These two requests were granted by this Court and extended the execution date from July 17, 1992, until December 17, 1992. On

December 16, 1992, *Applicant's attorneys* initiated an unsuccessful federal writ application and appeal to the Fifth Circuit Court of Appeals. *Applicant's attorneys* then took the issues raised by that habeas application to the United States Supreme Court where they were not resolved until January 9, 1995. Consequently, since the setting of the initial execution date of July 17, 1992, any delay in the implementation of the sentence was directly attributable to Applicant's numerous requests for stays and modifications of the execution dates. In essence, various entities acting on Applicant's behalf have managed to delay his execution for almost 2½ years. At the same time, these same entities are responsible for the setting of two of the four execution dates and the filing of numerous documents attacking Applicant's death sentence.

What has been glaringly absent however, is any single mention of the physical and psychological "torture" that Applicant's attorneys now claim has incapacitated him to such a degree that the State should forfeit its right to carry out the jury's judicially approved sentence. Notably, this application represents the second time that Applicant has attacked his confinement on death row in Texas courts under this cause number and the third time overall that he has alleged error in his conviction or sentence since the setting of the initial execution date. Nevertheless, he has not argued that the assertion he brings in this successive application could not have been raised in his first state application or within his first federal application - even though Applicant's instant application is explicit and persistent in maintaining that his claims of emotional and physical duress have allegedly existed for several years.

The Court of Criminal Appeals has recognized the doctrine of "abuse of writ" and held that an applicant may waive and abandon his allegations by the repetitious filing of applications. In *Ex parte Carr*, 511 S.W.2d 523 (Tex.Crim.App. 1974), the Court stated that:

> "A proper respect for the concept of justice it is the office of the Great Writ to protect, requires that petitions be filed in earnest and that all contentions of merit be presented and ruled upon as expeditiously as possible. The writ of habeas corpus is too serious and important a matter to be lightly used, and easily abused. It is a shield against injustice which should not be suffered to become a weapon in the hands of spiteful persons."
>
> Id. at 525.

In the instant case, Applicant persists in raising repetitious applications that continue to lack merit without explaining why he could not have brought his complaints in his initial writ applications. His abuse of the state writ process may procedurally bar him and foreclose the issue.

Regardless, Applicant is advancing a novel argument in that the State cannot execute him because to do so would subject him to unconstitutionally cruel and unusual punishment resulting from the number of years he has spent on death row. In support of this argument Applicant offers primarily a Jamaican appellate case in which the sentences of two men were commuted from death to life after a delay of sixteen years in carrying out their executions. *Earl Pratt and Ivan Morgan v. The Attorney General for Jamaica and the Superintendent of Prisons, Saint Catherine's, Jamaica*, Privy Council Appeal No.10 of 1993 (Judgement of the Lords of the Judicial Committee of the Privy Council, 11/2/93). However, it cannot be argued that the courts of this country are bound or

guided by a decision from the cited foreign jurisdiction, or any other foreign jurisdiction. Further, the rationale of the Jamaican case is that the death penalty was not carried out expeditiously after sentence, within a matter of weeks or months in the event of appeal; that rules and practices were set forth in a strict timetable for appeals to the Judicial Committee of the Privy Council that was in force in Jamaica before independence and adopted after independence by the Governor-General in Privy Council in 1962; that such rules and practices were not followed in the *Pratt and Morgan* case; that the applicable law which was included in the Constitution against the background of preexisting common law held that execution follow as quickly as practical after sentence; and, that the delay in *Pratt and Morgan* case would never have been so extensive if the Governor-General and the Judicial Privy Council had reviewed the case pursuant to sections 90 and 91 of the Constitution in 1981 after the Court of Appeal dismissed application for leave to appeal. The Jamaican case, which extensively discusses the legal vehicles and practices in Jamaica and the United Kingdom, is inapplicable to the instant case and to any other death penalty case in the State of Texas. If applicable, all death row inmates who were not executed after a specific period of time, i.e., three years, could argue that their sentences should be commuted to life imprisonment. Applicant has not propounded any persuasive holdings from the courts of this State or the United States which would establish that the amount of time spent on death row should be the measure of the constitutionality of a particular death sentence under the eight and fourteenth amendments. Neither does Applicant offer Texas or federal authority which controls the question of

whether his sentence constitutes one of "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." See, *Stanford v. Kentucky*, 492 US 361, 368, 106 L Ed 2d 306, 109 S Ct 2969 (1989) *reh. den.* 492 US 937, 106 L Ed 2d 635, 110 S Ct 23 (1989); *Ford v Wainwright*, 477 US 399, 405, 91 L Ed 2d 335, 106 S Ct 2595 (1986).

This leaves Applicant to argue that the effect of years spent on death row is contrary to the "evolving standards of decency that mark the progress of a maturing society." *Stanford v. Kentucky*, 492 US at 369, *quoting Trop v Dulles*, 356 US 86, 101, 2 L Ed 2d 630, 78 S Ct 590 (1958). In determining what standards have "evolved," courts should look not to their own conceptions of decency, but to those of modern American society as a whole. In presenting authority primarily from the English Commonwealth, Applicant ignores the clear teachings of the U.S. Supreme Court in *Stanford*, as Justice Scalia explained:

> "We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici... that the sentencing practices of other countries are relevant. While '[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well.' *Thompson v Oklahoma*, 487 US 815, 868-869, n 4, 101 L Ed 2d 702, 108 S Ct 2687 (1988) (Scalia, J., dissenting), *quoting Palko v Connecticut*, 302 US 319, 325, 82 L Ed 288, 58 S Ct 149 (1937) (Cardozo, J.), they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people."
>
> *Stanford v. Kentucky*, 492 US at 369, fn 1.

This Court is not persuaded by Applicant's American "authority" that his time spent on

death row denies the State the right to execute him. The proffered cases merely describe the existence of inmates confined in places outside of the Texas prison system and do not decide the question of whether such conditions rise to the level of unconstitutionally cruel and unusual punishment.

Finally, the Supreme Court, in the case which Applicant claims is analogous to the instant case, stated:

> "Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. **Even the fact that Petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely**... we cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty. (emphasis added) .
>
> *State of Louisiana ex rel. Francis v. Resweber, Sheriff, et al.*, 329 U.S. 459; 67 S.Ct. 374, 376 (1947).

Undeniably, Applicant's coming "within hours" of his third legally scheduled execution date cannot rise to the level of a denial of due process because of cruelty. Further, as the Supreme Court stated in *Whitley*, *supra*, "[n]ot every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny, however. *Whitley*, 475 U.S. at 318, 106 S.Ct. at 1084. An eighth amendment claimant must allege and prove the unnecessary and wanton infliction of pain, and this general requirement should be applied with due regard for the differences in the kind of

conduct of which the claimant is complaining. Id. For example, extreme deprivation is required for a valid conditions-of-confinement claim. *Hudson*, 112 S.Ct. at 1000. Deliberate indifference to a prisoner's medical needs rises to an eighth amendment violation only if the prisoner's medical needs are serious. Id. Excessive force, used maliciously and sadistically to cause harm, always violates the eighth amendment, but not "every malevolent touch by a prison guard gives rise to a federal cause of action." Id. Moreover, to the extent that conditions of confinement "are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offense against society." *Rhodes*, 452 U.S. at 347, 101 S.Ct. at 2399.

In the instant case, Applicant, while complaining of the slow pace of the implementation of his death sentence because of appellate and habeas review, is also complaining that such review is going forward to the extent that there is a pending execution date; and, that he is psychologically unable to cope with the stress of the events. Applicant's claim is not cognizable in a petition to determine the legality of his sentence or confinement and does not rise to the level of denial of due process pursuant to the eighth amendment of the United States Constitution or Article 1, section 13 of the Texas Constitution.[1] Based on the foregoing, Applicant's claim is without merit and should be denied. He raises questions of law and fact which can be resolved by the Court

---

[1] As the Seventh Circuit Court of Appeals noted, when reviewing John Wayne Gacy's final petition for writ of habeas corpus, "[t]he district court concluded that Gacy's difficulty in coping with the events does not differ from what many other persons experience when all legal and factual avenues have been exhausted and the end of mortal existence looms." *Gacy v. Page*, 24 F.3d 887 (7th Cir. 1994).

of Criminal Appeals upon review of official court records and without need for an evidentiary hearing.

In conclusion, Applicant has completely failed to allege facts which would entitle him to habeas corpus relief. Nor does the application in question show that there are previously unresolved issues affecting Applicant's sentence. This Post-Conviction Writ of Habeas Corpus should be denied. In consideration of the additional requests attached to Applicant's application, the Court is of the opinion that:

(1) Applicant's request for a stay of his execution is denied.

(2) His request for the issuance of a writ of habeas corpus is denied.

(3) His request for an evidentiary hearing is denied.

(4) The record reveals that this Court has already granted Applicant the right to proceed in *forma pauperis* in regards to his payment of costs and fees.

(5) Applicant has failed to demonstrate that he is entitled to relief under V.A.C.C.P. Art. 11.07. Consequently, his application is in all things denied.

ORDER

1. The Clerk of this Court shall promptly submit to the Clerk of the Court of Criminal Appeals a transcript containing the following:

   A. A copy of the Applicant's Petition for Writ of Habeas Corpus and attached exhibits, and

   B. A copy of this Findings of Fact and Conclusions of Law.

2. A copy of these Findings of Facts and Conclusions of Law shall be promptly delivered to Mr. Brent E. Newton, Attorney for Applicant, Texas Resource Center, 3223 Smith Street, Suite 215, Houston, Texas 77006.

SIGNED AND ENTERED this 1st day of March, 1995 A.D.

Respectfully submitted,

Cecil G. Puryear,
JUDGE PRESIDING

APPENDIX B

EX PARTE CLARENCE ALLEN LACKEY

WRIT NO. 24,267-02

Habeas Corpus Application
From LUBBOCK County

O R D E R

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Art. 11.07, V.A.C.C.P.

On April 15, 1983, a jury found applicant guilty of the offense of capital murder. Punishment was assessed at death. This Court affirmed applicant's conviction on direct appeal. Lackey v. State, 819 S.W.2d 111 (Tex.Cr.App. 1989). The trial court has scheduled applicant's execution to be carried out on or before sunrise, March 6, 1995.

In the instant cause, applicant presents a single allegation in which he challenges the constitutionality of proceeding with his execution. The trial court has entered findings of fact and conclusions of law and recommended the relief sought be denied.

This Court has reviewed the record. The findings and conclusions entered by the trial court are supported by the record and upon such basis the relief sought is denied.

IT IS SO ORDERED THIS THE 1ST DAY OF MARCH, 1995.

PER CURIAM

En banc
Do Not Publish
Clinton, J., not participating.

APPENDIX C

NO. 94-10302

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHNNY LOGAN HICKS,
Petitioner-Appellant,

v.

WAYNE SCOTT, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent-Appellee.

On Appeal From the United States District Court
For the Northern District of Texas
Fort Worth Division

RESPONDENT-APPELLEE'S RESPONSE
TO PETITIONER-APPELLANT'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC*

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General
For Criminal Justice

WILLIAM C. ZAPALAC
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ATTORNEYS FOR RESPONDENT-APPELLEE

NO. 94-10302

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHNNY LOGAN HICKS,
Petitioner-Appellant,

v.

WAYNE SCOTT, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent-Appellee.

On Appeal From the United States District Court
For the Northern District of Texas
Fort Worth Division

RESPONDENT-APPELLEE'S RESPONSE
TO PETITIONER-APPELLANT'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC*

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

NOW COMES Wayne Scott, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellee, hereinafter "the Director," by and through the Attorney General of Texas, and files this his Response to Petitioner-Appellant's Petition for Rehearing and Suggestion For Rehearing *En Banc.*

I.

On October 13, 1994, a panel of this court affirmed the district court's denial of relief to Petitioner-Appellant, hereinafter "Hicks." The panel held, *inter alia,* that the Texas Court of Criminal Appeals' citation of Hicks for abuse of the writ constituted a procedural default that barred federal habeas review of his *Batson*[1] claim.

Hicks now seeks both panel rehearing and rehearing *en banc* on three grounds: (1) that Texas' abuse-of-the-writ doctrine is not an adequate and independent state law ground, (2) that Hicks adequately preserved his *Batson* claim at trial, and (3) that Hicks was not required to make a trial objection to preserve *Batson* error. The Director is constrained to confess error as to the first ground; the judgment of the district court nonetheless should be affirmed, however, because Hicks' other grounds for rehearing are meritless.

II.

Hicks first argues that the panel erred in finding that the Texas Court of Criminal Appeals regularly and strictly applies its abuse-of-the-writ doctrine After having reviewed the authorities cited by Hicks and conducting additional research, the undersigned has concluded that Hicks' position is legally correct. Thus, the Director confesses error as to this point of law and concedes that being cited for abuse of the writ by the Texas Court of Criminal Appeals does not bar a federal habeas petitioner from review of the merits of his claims.

III.

Hicks next argues that he adequately preserved his *Batson* claim at trial. He is incorrect. Hicks candidly concedes that his "argument at trial was not a *Batson* objection *per se* . . . ." Petition at 5. Instead, "trial counsel's arguments primarily

[1] *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712 (1986).

concerned an objection to the State's use of the jury shuffle as a means to keep African-Americans off of [Hicks'] petit jury . . . . " *Id.* Thus, Hicks did not preserve *Batson* error under the law of this Circuit, which requires "'a timely objection . . . to the prosecutor's use of his peremptory challenges.'" *Wilkerson v. Collins*, 950 F.2d 1054, 1063 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 3035 (1992), quoting *Thomas v. Moore*, 866 F.2d 803, 804 (5th Cir.), *cert. denied*, 493 U.S. 840, 110 S. Ct. 124 (1989).

Hicks, relying on *Trevino v. Texas*, ___ U.S. ___, 112 S. Ct. 1247 (1992), also argues that inasmuch as his trial was held before *Batson* was decided, a more liberal standard should apply to whether he preserved error. *Trevino* provides Hicks no succor, however, because in that case the defendant specifically objected to the state's use of peremptory challenges to exclude minority venire members. 112 S. Ct. at 1548. Here, Hicks took no such action, and he therefore is not entitled to merits review of this claim as a matter of federal constitutional law.

IV.

Finally, Hicks argues that under *Ford v. Georgia*, 498 U.S. 411, 111 S. Ct. 850 (1991), a contemporaneous trial objection is not required as a substantive component of a *Batson* claim. Again, Hicks is mistaken. In *Ford*, the Court held that the Georgia courts could not impose a state procedural bar that did not exist at the time of his trial. The question whether Ford had complied with the requirements of *Batson* itself was not presented in that case, because "[t]he State, indeed, concedes that petitioner properly raised a *Swain*[2] claim in his pretrial motion . . . . ," 111 S. Ct. at 855, and "a defendant alleging a violation of equal protection of the law under *Swain* necessarily states an equal protection violation

[2] *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824 (1965).

subject to proof under the *Batson* standard of circumstantial evidence as well." *Id.* at 856.

Thus, contrary to Hicks' assertion, *Ford* did not overrule the law of this Circuit that *Batson* itself requires a trial objection. That this is so is further evident from the Court's denial of *certiorari* in *Wilkerson* after *Ford* had been decided. Hicks' failure to preserve *Batson* error at trial bars federal habeas review of that claim.

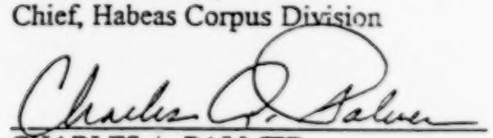
Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General for
Criminal Justice

WILLIAM C. ZAPALAC
Assistant Attorney General
Chief, Habeas Corpus Division



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ATTORNEYS FOR
RESPONDENT-APPELLEE

CERTIFICATE OF SERVICE

I, Charles A. Palmer, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent-Appellee's Response to Petitioner-Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* has been served by placing same in the United States Mail, postage prepaid, on this the 17th day of November, 1994, addressed to: Steve Losch, Attorney At Law, 5454 Newcastle Drive, Apt. 1823, Houston, Texas 77081, David Cunningham, 2740 Texas Commerce Tower, 600 Travis Street, Houston, Texas 77002, and Robert C. Owen, Texas Resource Center, 1206 San Antonio Street, Austin, Texas 78701.

CHARLES A. PALMER
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JERRY LEE HOGUE, Petitioner	§	
V.	§	CIVIL ACTION NO. 4:92-CV-359-A
WAYNE SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent	§	

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO FED.R.CIV.P. 59(e) AND BRIEF IN SUPPORT.

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Wayne Scott, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein, by and through his attorney, the Attorney General of Texas, and files this his Response to Petitioner's Motion to Alter or Amend the Judgment Pursuant to FED.R.CIV.P. 59(e). In Support thereof, Respondent would respectfully show the Court as follows:

On November 17, 1994 the Court entered its final judgment and denied the petition for writ of habeas corpus filed by Petitioner, hereinafter "Hogue." On November 28, 1994 Petitioner filed a Motion to Alter and Amend Judgment Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Hogue requests this Court to amend its Memorandum Opinion and Order to reflect Respondent's recent concession in *Hicks v.* Scott, No. 94-10302 (5th Cir. 1994), that the invocation of "abuse of the writ" against Mr. Hogue by the Texas Court of Criminal Appeals cannot bar federal review of the merits of his claims.

In light of the Director's recent concession that citation for abuse of the writ by the Texas Court of Criminal Appeals does not bar a federal habeas petitioner

from review of the merits of his claims, the Director agrees that it is appropriate to amend this Court's November 17, 1994 Memorandum Opinion and Order to omit reliance on the Court of Criminal Appeals' finding of abuse of the writ as a procedural bar foreclosing Hogue from having his petition reviewed on its merits.

The Director contends, however, that this Court's alternative holding on the merits of the issues demonstrates Hogue is not entitled to habeas corpus relief. Additionally, the Director submits that the Supreme Court's recent decision in *Romano v. Oklahoma*, 114 S.Ct 2004, 2011-13 (1994) further supports the Court's holding in Section VI (D).

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully consents to Hogue's' motion to amend this Court's November 17, 1994 Memorandum Opinion and Order.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General
for Criminal Justice

MARGARET PORTMAN GRIFFEY
Assistant Attorney General
Chief, Capital Litigation Division

RENEAU J. LONGORIA
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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Reneau J. Longoria, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent's Response to Petitioner's Motion to Alter or Amend the Judgment Pursuant to FED.R.CIV.P. 59(e) and Brief in Support has been served by hand-delivery on this the 5th day of December, 1994, to: Robert Owen, Texas Resource Center, 1206 San Antonio Street, Austin, Texas 78701.

RENEAU J. LONGORIA
Assistant Attorney General

APPENDIX D

POST CONVICTION REMEDIES

PURSUANT TO ARTICLE 11.07, V.A.C.C.P.

© 1990

John G. Jasuta

Chief Staff Attorney

Court of Criminal Appeals

512/463-1600

updated November 8, 1990

the writ is assigned will make an initial review and presentation of the application to the Court in banc. As stated above, the Court will either vote to deny the writ, remand for further fact findings, or file and set the writ. If denial is the course chosen a postcard, known in inmate circles as the "white card", will be sent to the applicant informing him or her that the application has been denied. Since the writ was never docketed there is no rehearing entertained from such an action. Tex.R.App.Pro., Rule 213(b). If further facts are necessary for disposition a remand order will be entered requiring the trial court to conduct a hearing or to gather information through other avenues available through the statute. See e.g. Ex parte Campos, 613 S.W.2d 745 (Tex.Cr.App. 1981); Ex parte Smith, 650 S.W.2d 68 (Tex.Cr.App. 1983). If the case is ordered filed and set for submission to the Court the cause is assigned an entirely new number which is part of the Court's regular appeal numbering system. However, if any new writ applications are filed by that individual, regardless of the outcome of the application which was ordered filed and set, it will be filed for initial review under the permanent writ number assigned to that individual.

PROCEDURES IN ABUSE CASES WITHIN THE COURT

The Court of Criminal Appeals recognized the doctrine of "abuse of the writ" in Ex parte Carr, 511 S.W.2d 523 (Tex.Cr.App. 1974). In that case the Court held that the applicant had waived and abandoned his allegations by his repetitious filing of applications for relief. The Court took the opportunity to explain the procedure to be followed in Ex parte Dora, 548 S.W.2d 392 (Tex.Cr.App. 1977). Review is not precluded, however, by the abuse order but the applicant must make a showing that the issue or issues have not been raised previously and could not have been, along with a showing of "good cause".

There is no general rule governing how many applications constitute an abuse of the writ process. Such a rule would be difficult if not impossible to draw since many applicants raise everything in their first application while others become repetitious at a much slower rate. In Ex parte Emmons, 660 S.W.2d 106 (Tex.Cr.App. 1983), the Court found the applicant to have committed perjury both in the application and at an evidentiary hearing. An abuse order was entered following this first application.

As stated, review and relief is not precluded by such an order. Ex parte Bilton, 602 S.W.2d 534 (Tex.Cr.App.1980), is an example where the applicant, after being cited for abusing the writ process, was granted relief due to a fundamentally defective indictment which holding was based on cases decided after applicant had been cited for his abuse. A change in the law entitled the applicant to relief in Ex parte Stuart, 653 S.W.2d 13 (Tex.Cr.App. 1983), after he had been cited for abuse.

COUNTY OF TRAVIS
STATE OF TEXAS

AFFIDAVIT OF TROY BENNETT

1. My name is Troy Bennett. I am Chief Clerk to the Court of Criminal Appeals for the State of Texas.

2. Each Wednesday when the Court of Criminal Appeals is in regular session, the Court makes public a list of its orders issued and opinions handed down.

3. One category listed in this weekly report is "APPLICATIONS FOR WRIT OF HABEAS CORPUS DENIED WITHOUT WRITTEN ORDER." Under this listing are the names of individuals whose writs of *habeas corpus* were so denied, preceded by a two-part number and followed by the county name in which the application was filed.

4. The two-part number preceding the individual's name indicates the four or five digit writ number assigned to the application by the Clerk's office, followed by a dash and a two digit number representing the total number of writs for *habeas corpus*, including that particular writ, filed by the individual challenging a particular conviction or sentence.

5. For example, in the weekly orders list issued on February 15, 1995, L.V. Morris' third writ of *habeas corpus* petition was denied without written order (6,510-03), as was Sherman Wilkins' thirteenth petition (8,217-13), Glen Dale Mulder's seventh petition (9,840-07), and Pete Benevides' twelfth petition (11,639-12). A true and correct copy of the orders list for that date is appended to this affidavit as Exhibit A and incorporated here by reference.

6. This procedure for identifying the number of applications for post-conviction writs of *habeas corpus* each individual has filed was developed informally by the Court and has been used for approximately 10-11 years.

I affirm that the foregoing is true and correct, and I so state under pain and penalty of perjury.

Troy Bennett

The foregoing instrument was signed and sworn before me on this 21st day of February, 1995.

John F. Brown
NOTARY PUBLIC

My commission expires: 11-25-1995

JOHN F. BROWN
Notary Public, State of Texas
My Commission Expires
Nov. 25, 1995

C T OF CRIMINAL APPEALS

FEBRUARY 15, 1995

THE FOLLOWING ORDERS ARE ENTERED AND OPINIONS HANDED DOWN:

HABEAS CORPUS RELIEF GRANTED - OPINIONS BY THE COURT:

71,994 EX PARTE JAMES HAROLD BROWN - HABEAS CORPUS APPLICATION FROM FAYETTE COUNTY
(JUDGE BAIRD CONCURS IN RESULT WITH NOTE)
(JUDGE KELLER DISSENTS)

72,022 EX PARTE DANIEL BLANCARTE PEREZ - HABEAS CORPUS APPLICATION FROM BEXAR COUNTY

72,023 EX PARTE STACY LYNN CONNER - HABEAS CORPUS APPLICATION FROM LUBBOCK COUNTY
(PRESIDING JUDGE MC CORMICK & JUDGE WHITE DISSENT)

72,024 EX PARTE BRYAN LUMAR PARKER - HABEAS CORPUS APPLICATION FROM DENTON COUNTY

STATE'S MOTION FOR REHEARING DENIED:

1,399 DAVID LEE POWELL FROM TRAVIS COUNTY
(JUDGE MANSFIELD WOULD GRANT ON NO. 1)

ON APPELLANTS' PETITIONS FOR DISCRETIONARY REVIEW:

793-91 ROY LEE HUBBARD FROM TARRANT COUNTY 02-89-00303-CR
JUDGMENT OF THE COURT OF APPEALS REVERSED:
CAUSE REMANDED TO THAT COURT - OPINION PRESIDING JUDGE MC CORMICK
(CONCURRING OPINION JUDGE BAIRD)
(CONCURRING IN PART & DISSENTING IN PART - OPINION JUDGE MALONEY JOINED BY JUDGE CLINTON)
(JUDGE OVERSTREET DISSENTS)
(JUDGE MEYERS NOT PARTICIPATING)

090-94 ROBERT LYNN WASHINGTON FROM HALE COUNTY 07-93-00113-CR
PETITION DISMISSED AS IMPROVIDENTLY GRANTED - OPINION BY THE COURT

179-94 EDGAR PAUL BROGDAN FROM HARRIS COUNTY 14-92-01038-CR
JUDGMENT OF THE COURT APPEALS REVERSED:
CAUSE REMANDED TO THAT COURT - OPINION JUDGE MALONEY
(PRESIDING JUDGE MC CORMICK & JUDGES WHITE & MEYERS DISSENT)
(JUDGE MANSFIELD CONCURS IN THE RESULT)

256-94 RONALD BROOKS FROM SMITH COUNTY 11-92-00219-CR
JUDGMENT OF THE COURT OF APPEALS REVERSED:
CAUSE REMANDED TO THAT COURT - OPINION BY THE COURT

389-94 CHARLES ALBRIGHT FROM DALLAS COUNTY 05-92-00006-CR
PETITION GRANTED ON NOS. 7 & 13 ONLY: JUDGMENT OF COURT OF APPEALS VACATED: CAUSE REMANDED TO THAT COURT - OPINION BY THE COURT
(JUDGE KELLER NOT PARTICIPATING)

APPELLANTS' PETITIONS FOR DISCRETIONARY REVIEW REFUSED:

0547-94	DELGADO, JESUS SOTO	DALLAS COUNTY	05-92-01761-CR
0548-94	DELGADO, JESUS SOTO	DALLAS COUNTY	05-92-01762-CR
0749-94	BOATWRIGHT, RICHARD	HARRIS COUNTY	01-93-01161-CR
1115-94	RANGEL, SANTOS	HARRIS COUNTY	01-92-01128-CR
1124-94	JENKINS, CALVIN HARLEY (JUDGE BAIRD WOULD GRANT)	WILLIAMSON COUNTY	03-92-00421-CR
1297-94	RENO, GREGORY WELLS (PDR#1)	TARRANT COUNTY	02-93-00208-CR
1322-94	HILL, ANITA MAE	RANDALL COUNTY	07-93-00156-CR
1339-94	LOPEZ, DAVID M.	TARRANT COUNTY	02-93-00123-CR
1398-94	DOYLE, BILLY	WARD COUNTY	08-93-00439-CR
1404-94	HOWARD, BERNARD DEVAUGH	MC LENNAN COUNTY	10-93-00258-CR
1411-94	MOFFETT, GARY WAYNE	DALLAS COUNTY	05-93-00650-CR
1412-94	MOFFETT, GARY WAYNE	DALLAS COUNTY	05-93-00651-CR
1413-94	GIVENS, JR., BAPTIST	DALLAS COUNTY	05-92-02005-CR
1414-94	DEES, JR., EDWARD AKA FACT ACTION BONDING	DALLAS COUNTY	05-93-01889-CV
1418-94	ADVINCULA, RAFAEL G.	DALLAS COUNTY	05-93-00276-CR
1419-94	GORDON, HARVEY DURELL	HARRIS COUNTY	01-93-00194-CR
1421-94	TK'S VIDEO, INC.	DENTON COUNTY	02-93-00099-CR
1424-94	JEANSONNE, CHRISTOPHER JAKE	HARRIS COUNTY	01-94-00027-CR
1425-94	JEANSONNE, CHRISTOPHER JAKE	HARRIS COUNTY	01-94-00028-CR
1427-94	JOHNSON, GEORGE KENNETH	HARRIS COUNTY	01-93-01159-CR
0014-95	JACKSON, PATRICK WAYNE	HARRIS COUNTY	14-93-00427-CR
0018-95	GUILLEN, TRINIDAD	TARRANT COUNTY	02-93-00197-CR
0045-95	PARRISH, BRENDA FAY (JUDGE BAIRD WOULD GRANT)	HARRIS COUNTY	14-90-00989-CR
0061-95	OWINGS, BRUCE ANTHONY	BRAZORIA COUNTY	14-93-00282-CR
0065-95	DIXON, DENISE BETTLOU AKA DIXON, DENISE BETTELOU	MONTGOMERY COUNTY	09-93-00164-CR
0066-95	TYLER, ROSALIND E.	JEFFERSON COUNTY	09-94-00002-CR
0086-95	TAPLIN, STANLEY GENE AKA TAPLIN, STANLEY	TARRANT COUNTY	02-93-00397-CR
0095-95	MORRISON, TOMMIE	HARRIS COUNTY	01-93-00429-CR
0098-95	SMITH, DANNY	WOOD COUNTY	12-94-00186-CR
0100-95	BROWN, OTIS CHARLES	DALLAS COUNTY	07-93-00270-CR
0101-95	BROWN, OTIS CHARLES	DALLAS COUNTY	07-93-00271-CR
0102-95	BROWN, OTIS CHARLES	DALLAS COUNTY	07-93-00272-CR
0103-95	BROWN, OTIS CHARLES	DALLAS COUNTY	07-93-00273-CR

STATE'S PETITION FOR DISCRETIONARY REVIEW REFUSED:

1297-94	RENO, GREGORY WELLS (PDR#2)	TARRANT COUNTY	02-93-00208-CR
1367-94	WARNER, WILLIE EDWARD	BELL COUNTY	03-92-00422-CR
1428-94	JOHNSON, CONTEE DUMONT	HARRIS COUNTY	14-92-01036-CR

(PRESIDING JUDGE MC CORMICK WOULD GRANT ON NO. 1)
(JUDGE MANSFIELD WOULD GRANT ON NO. 2)

APPELLANTS' MOTIONS FOR REHEARING ON PETITION FOR DISCRETIONARY REVIEW DENIED:

0929-94	DAMIAN, JAMES EDWARD	BRAZORIA COUNTY	01-91-01444-CR
1116-94	SHOULDERS, CURTIS	HARRIS COUNTY	01-93-00243-CR
1117-94	WALL, DONNIE KEITH	JACKSON COUNTY	13-92-00493-CR
1206-94	LYON, RICHARD ALAN ABOOD (JUDGE KELLER NOT PARTICIPATING)	DALLAS COUNTY	08-92-00165-CR
1219-94	SURETTE, GWEN P.	HARRIS COUNTY	01-93-00432-CR
1248-94	THACKER, LESLIE HAZLETT	HARRIS COUNTY	14-92-00595-CR

STATE'S MOTION FOR REHEARING ON PETITION FOR DISCRETIONARY REVIEW DENIED:

0346-93	PAVLAKA, DAVID STANLEY	HARRIS COUNTY	01-91-01010-CR

APPLICATIONS FOR WRIT OF HABEAS CORPUS DENIED WITHOUT WRITTEN ORDER:

6,510-03	MORRIS, L. V.	DALLAS COUNTY
8,217-13	WILKINS, SHERMAN	TRAVIS COUNTY
9,840-07	MULDER, GLEN DALE	JOHNSON COUNTY
1,639-12	BENEVIDES, PETE	GALVESTON COUNTY
2,113-02	BYNUM, ROBERT LOUIS	HARRIS COUNTY
2,406-02	BLOUNT, JOE TERRELL	HARRIS COUNTY
2,866-03	MURRELL, GETZELL	JOHNSON COUNTY
3,943-03	PIERCE, DONALD RAY	SMITH COUNTY
4,222-02	BELTON, THERON	ANGELINA COUNTY
6,641-04	WALTON, JAMES ODELL	DALLAS COUNTY
7,423-02	DOZIER, GENE EDWARD	NAVARRO COUNTY
7,818-04	WIGLEY, TROY EUGENE	TRAVIS COUNTY
7,910-03	KNOTTS, JOSEPH ALEXANDER	HARRIS COUNTY
8,113-02	MC DONALD, BERT	SMITH COUNTY
9,652-02	ROWLAND, JAMES EDWARD	DALLAS COUNTY
0,157-03	JACKSON, PATRICK MAC	HARRIS COUNTY
1,382-02	MOORE, HARRY P.	LAVACA COUNTY
1,472-03	SMITH, LARRY LEE	VICTORIA COUNTY
1,760-02	LEOS, ZENON C.	NUECES COUNTY
1,911-02	BUJANDA, RUBEN BAYAN	MIDLAND COUNTY
3,357-03	DOWDEN, MICHAEL LERON	DALLAS COUNTY
3,843-02	HAWKINS, LEON, JR.	HARRIS COUNTY
3,926-07	NEESE, JAY TODD	ORANGE COUNTY
4,556-01	BROOME, STEVE (JUDGE MALONEY WOULD FILE & SET)	MC LENNAN COUNTY
4,556-02	BROOME, STEVE (JUDGE MALONEY WOULD FILE & SET)	MC LENNAN COUNTY
5,357-01	ZIENTEK, RONALD L.	HARRIS COUNTY
5,482-02	ROWAN, THOMAS RANDALL	HOOD COUNTY
6,142-02	LYNCH, JIMMIE LEE	TARRANT COUNTY
6,642-02	STEELMAN, DAVID	WILLIAMSON COUNTY
6,643-03	STEELMAN, DAVID	WILLIAMSON COUNTY
6,730-02	JOHNSON, DAVID LYNN	RANDALL COUNTY
6,750-02	BLACK, FREDDIE ELLISON, JR.	WICHITA COUNTY
6,869-02	RATLEY, JERRY CECIL	JEFFERSON COUNTY
6,885-02	CITIZEN, SAMUEL	JEFFERSON COUNTY
7,091-03	CARILLO, RUSSELL ROBERT	LAVACA COUNTY
7,106-01	LANTRIP, WILLIAM T., SR.	HARRISON COUNTY
7,142-02	MARK, FRANKIE	ANGELINA COUNTY
7,143-02	SHELTON, MICHAEL	TRAVIS COUNTY
7,160-02	MONTGOMERY, GEORGE WAYNE	EASTLAND COUNTY

27,333-03	HERNANDEZ, OMERO GREGORIO	WARD COUNTY
27,467-02	JOHNSON, WILBERT CECIL	DALLAS COUNTY
27,492-02	MC CULLEN, JAMES WOOD	ANGELINA COUNTY
27,629-01	MC NULTY, TERRY PAUL	DALLAS COUNTY
27,701-01	PEOPLES, IRA, JR.	TARRANT COUNTY
27,715-01	FOULK, KENNETH GEORGE	DALLAS COUNTY
27,772-01	KALFAS, AGAPITOS NICKOLAS	HARRIS COUNTY
27,773-01	VOLK, TROY NORMAN	HARRIS COUNTY
27,773-02	VOLK, TROY NORMAN	HARRIS COUNTY
27,775-01	GRAHAM, JAMES CLEO	TARRANT COUNTY
27,777-01	OSSA, RICHARD	HARRIS COUNTY
27,780-01	PRIEST, LARRY	GONZALES COUNTY
27,781-01	HAZEL, BRANDON EUGENE	MC LENNAN COUNTY
27,783-01	MAGOON, MICHAEL ARTHUR	BRAZORIA COUNTY
27,786-01	BUCHANAN, TONY	SMITH COUNTY
27,786-02	BUCHANAN, TONY	SMITH COUNTY
27,788-01	TROYER, JAMES	DALLAS COUNTY
27,820-01	RYAN, DANNY PAUL, SR.	TOM GREEN COUNTY
27,820-02	RYAN, DANNY PAUL, SR.	COMANCHE COUNTY
27,821-01	FOSTER, LESLIE RAY	BRAZORIA COUNTY
27,826-01	ROBERTS, DONALD RAY	WALLER COUNTY
27,827-01	SHAMSIDEEN, ASADI	DALLAS COUNTY
27,828-01	JOHNSON, EDWARD CHARLES, AKA JOE ORLANDO JONES	DALLAS COUNTY
27,848-01	GILMER, MORGAN S.	ROCKWALL COUNTY
27,849-01	RILEY, CORIEL	BEXAR COUNTY
27,850-01	KIERN, TIMOTHY	TRAVIS COUNTY
27,851-01	MC CUNE, ROBERT	ANDERSON COUNTY
27,857-01	TEJEDA, RUDY	BEXAR COUNTY
27,870-01	PARKS, WALTER CRAYLE, JR.	DENTON COUNTY
27,873-01	EATON, JAMES ELVIM	DALLAS COUNTY
27,908-01	THOMAS, JOHN	HARRIS COUNTY
27,916-01	DRAKE, ROBERT EARL	BURNET COUNTY
27,916-02	DRAKE, ROBERT EARL	BURNET COUNTY
27,916-03	DRAKE, ROBERT EARL	BURNET COUNTY
27,917-01	GORDON, BOBBY DAN	DALLAS COUNTY
27,919-01	JACKSON, EUGENE	BEXAR COUNTY
27,940-01	FUQUA, JERRY DONNELL	DALLAS COUNTY
27,954-01	BANNISTER, BRUCE KEVIN	BRAZOS COUNTY
27,946-01	WARD, WILLIAM DEWAYNE	POLK COUNTY
27,956-01	REESE, MERLIN	TRAVIS COUNTY
27,970-01	CURRIE, WILLIAM	MADISON COUNTY
27,971-01	HOLT, MICHAEL RAY	TARRANT COUNTY
27,974-01	PAGE, PERCY	CHAMBERS COUNTY
27,976-01	WILLIAMS, KEITH ELLIOTT	HARRIS COUNTY
28,003-01	RAYBORN, LESLIE TODD	WOOD COUNTY
28,004-01	REAK, RICKY IRVING	NAVARRO COUNTY
28,005-01	QUIGLEY, DAVID NEAL	DENTON COUNTY
28,006-01	WEBSTER, WAYMON, JR.	ROBERTSON COUNTY
28,030-01	JACKSON, DERWIN LATHOMAS	DALLAS COUNTY
28,037-01	BANKS, LEE CARL	BRAZORIA COUNTY
28,056-01	MINEX, BRYAN KEITH	DALLAS COUNTY

MOTION FOR LEAVE TO FILE APPLICATION FOR WRIT OF HABEAS CORPUS DENIED WITHOUT WRITTEN ORDER:

28,068-01	JAIKARAN, JACQUES & SUHAILA	HARRIS COUNTY (2-9-95)

APPLICATIONS FOR WRIT OF HABEAS CORPUS DISMISSED:

26,408-02	MC CORD, JEFFREY MICHAEL	DE WITT COUNTY
26,408-03	MC CORD, HEFFREY MICHAEL	DE WITT COUNTY
6,408-04	MC CORD, JEFFREY MICHAEL	DE WITT COUNTY
8,040-01	GASTON, DARRYL WAYNE	DALLAS COUNTY

MOTION FOR LEAVE TO FILE APPLICATION FOR WRIT OF MANDAMUS DENIED WITHOUT WRITTEN ORDER:

3,057-01	BROWN, RALPH	LAMAR COUNTY

MOTION FOR LEAVE TO FILE APPLICATIONS FOR WRIT OF PROHIBITION & MANDAMUS DENIED WITHOUT WRITTEN ORDER:

,058-01	SAVAGE, III, JOHNNY HORACE	BEXAR COUNTY

APPLICATIONS FOR WRIT OF HABEAS CORPUS REMANDED FOR EVIDENTIARY HEARING:

,778-01	PATTON, RICKY A.	ANDREWS COUNTY
,813-01	STERLING, DAVID ROSS	TITUS COUNTY
,814-01	STOVER, MICHAEL LOUIS	DALLAS COUNTY

APPLICATIONS FOR WRIT OF HABEAS CORPUS ORDERED FILED AND SET FOR SUBMISSION:

,464-02	PEREZ, DANIEL BLANCARTE	BEXAR COUNTY
,823-01	CONNER, STACY LYNN	LUBBOCK COUNTY
,736-01	MARTINEZ, JOHN VALDEZ	CALDWELL COUNTY
,741-01	MARTINEZ, DOMINGO VALDEZ	CALDWELL COUNTY
,964-01	PARKER, BRYAN LUMAR	DENTON COUNTY

No. 94-8262

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CLARENCE LACKEY

Petitioner,

v.

STATE OF TEXAS,

Respondent.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Supplement to the Petition for Writ of Certiorari was served on counsel for Respondent by fax to: Enforcement Division, Office of the Attorney General, Price Daniel Sr. Bldg., Austin, Texas, 78711, this 1st day of March, 1995. I further certify that all parties required to be served have been served. I am a Member of the Bar of this Court.

Respectfully submitted,

Robert C. Owen by express permission RBO/. Newton

Robert C. Owen
Counsel for Petitioner

FILED
MAR 2 1995
CLERK

NO. 94-8262

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CLARENCE ALLEN LACKEY,
Petitioner,
v.
STATE OF TEXAS
Respondent.

Amicus Curiae Brief In Support Of Petitioner Submitted By English Bar Committee Of Human Rights

BRIEF AMICUS CURIAE

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On behalf of the Bar of England and Wales Human Rights Committee

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QUESTION PRESENTED

Whether the execution of a death sentence constitutes cruel and unusual punishment under the Eighth Amendment as understood by the Framers if, as a result of inordinate delay not attributable to his own conduct, the condemned inmate is forced to endure nearly two decades on death row, during which time his execution is repeatedly rescheduled.

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No. 94-8262

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CLARENCE ALLEN LACKEY
Petitioner,
v.
STATE OF TEXAS
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

BRIEF AMICUS CURIAE

COMES NOW, the English Bar Committee of Human Rights, and respectfully submits the following *amicus curiae* brief in support of Clarence Allen Lackey's Petition for Writ of Certiorari.

INTEREST OF AMICUS CURIAE

The Human Rights Committee of the Bar of England and Wales regularly appears on behalf of persons whose human rights are endangered. Whether domestic tribunals will receive our *amicus curiae* briefs depends on their domestic rules. It is respectfully submitted that this Court should admit this brief in support of the instant Petition since:

(i) the comity of the common law nations makes the experience of each persuasive to the other;

(ii) the United States Government has ratified the International Covenant on Civil and Political Rights,

effective June 8, 1992, evincing a sincere concern to comply with norms of international law.

II. GROUNDS PRESENTED IN THE BRIEF

The Bar Committee seeks to supply support to the constitutional challenge to Clarence Lackey's long delayed execution as a violation of due process of law and also as cruel and unusual punishment under the American Constitution. *Amicus* respectfully contends that due process of law does not end with pronouncement of the sentence of death, and that cruel and unusual punishment may occur well before the actual execution of a death sentence.

A. A DELAYED EXECUTION IS NOT BY DUE PROCESS OF LAW

1. PRATT & MORGAN

On 2nd November, 1993, the Judicial Committee of the Privy Council (Lords Griffiths, Lane, Ackner, Lowry, Slynn of Hadley and Woolf) delivered a far reaching and landmark judgment in the case of Earl Pratt & Ivan Morgan v The Attorney-General for Jamaica et al. The Judicial Committee had not sat *en banc* -- as a board of seven -- since the 1940s; but this was an exceptional constitutional challenge to the legality of hanging Commonwealth prisoners who had been on death row for more than 5 years. (Philip Sapsford, Queen's Counsel, appeared as a Counsel for the Petitioners, Earl Pratt and Ivan Morgan.)

Lord Griffiths stated, in the course of delivering the judgment:

> "... The death penalty in the United Kingdom has always been carried out expeditiously after sentence, within a matter of weeks or in the event of an appeal, even to the House of Lords, within a matter of

> months. Delays in terms of years are unheard of ..."
> "... It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment. Prior to Independence, applying the English common laws, judges in Jamaica would have had the like power to stay a long delayed execution, as foreshadowed by Lord Diplock ... when he said ...: "In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not by due process of law."
>
> "...there were a number of factors which have to be balanced in weighing the delay. If delay is due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process, the accused cannot be allowed to take advantage of that delay for to do so would permit the accused to use illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime..."
>
> "A much more difficult question is whether the delay occasioned by the legitimate resort of the accused to all available appellate procedures should be taken into account, or whether it is only delay that can be attributed to the shortcomings of the State that should be taken into account. There is a powerful argument that it cannot be inhuman or degrading to allow an accused every opportunity to prolong his life and

resort to appellate procedures however extended may be the eventual time between sentence and execution. This is the view that currently prevails in some States in the United States and has resulted in what has become known as the death row phenomenon where men are held under sentence of death for many years while their lawyers pursue a multiplicity of appellate procedures ..."

"... in their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it."

"... Appellate procedures that echo down the years are not compatible with capital punishment.... The death row phenomenon must not become established as a part of our jurisprudence."

"... The total period of delay in this case is shocking and now amounts to almost fourteen years."

2. ENGLISH COMMON LAW

"... there is a formidable case for suggesting that execution after inordinate delay would haveinfringed the prohibition against cruel and unusual punishment to be found In Section 10 of the Bill of Rights

1689..."[1]

The 1689 Bill of Rights was part of English legislation in force in 1727 at the commencement of the reign of George II and applied in and to the American Colonies at that time. An application by a prisoner alleging contravention of the 1689 Bill of Rights in this respect could properly have been made.

It follows that the execution of a prisoner was not an act which could be performed at any time after sentence; it was a process developed by custom and practice for dealing with a condemned prisoner from the moment the death sentence was passed to the moment his body was buried within walls. A defining characteristic of that process was that *time was of the essence*; it had to be carried through every stage without undue delay. See generally Pratt & Morgan.

The "right to life" is the "right not to be deprived thereof except by due process of law." Due process of law does not end with the delivery of judgment in a civil matter or the pronouncement of sentence in a criminal matter; it includes the enforcement of judgments and the carrying out of sentences:

> "... it is possible to imagine cases in which the time allowed by the authorities to elapse between the pronouncement of death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to

[1] Riley v. Attorney General of Jamaica, 1 AC 719, 3 All ER 469 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman), majority opinion overruled by Pratt & Morgan v. Attorney General of Jamaica, 2 AC 1, 4 All ER 769 (Privy Council 1993) (*en banc*).

> a sentence of life imprisonment. In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not "by due process of law":

Abbot v. Attorney-General of Trinidad and Tobago (1979) 1 WLR 1342 (opinion of Lord Diplock).

Thus, what was foreshadowed here by Lord Diplock, one of the greatest of English jurists, was the recognition that inordinate delay might mean that the taking of the condemned man's life would not be "by due process of law." Significantly he commented that a case of delay so prolonged as to arouse a reasonable belief that he might be spared was "without precedent." Abbott's case therefore confirms the correct jurisprudential approach that the period and circumstances of delay may be such as to put the taking of the man's life outside the due process of law.

The custom and practice of executing convicted murderers without delay antecedes even the practice of executing them only by hanging. It may be traced back at least as far as 1752, when "An Act for better preventing the horrid Crime of Murder" (25 Geo 2, c37) provided that all persons convicted of murder should be executed on the next day (unless convicted on a Friday in which case execution took place on the Monday). In all other cases where the punishment was death, it followed almost as promptly.

The first edition of Dr. Chitty's treatise on the criminal law, published in 1816, states the position:

> "... As far as the interests of the public are effected, it is certainly desirable that the punishment should follow the sentence with as little delay as possible. The minds of the populace are always disposed to

> separate the idea of punishment from that of guilt, and to look on the criminal merely as a sufferer ... as the only benefit that can be derived from the infliction of death is the terror excited by its example, it should be as immediate as circumstances will allow. If a long delay rises, the spectators look on the execution rather as a terrible sight than the necessary consequence of transgression."

(Vol, 1 "Punishment of Death," at p.783).

In England, the date of execution was fixed by the sheriff for a day in the fourth week after the death sentence was passed. In Scotland, the date of execution was fixed by the court under section 2 of the Criminal Law (Scotland) Act 1830: if sentence was pronounced south of the Forth, it was to be fixed between 15 and 21 days hence, and if north of the Forth, between 20 and 27 days hence. In both England and Wales, the Court of Appeal heard an appeal in a capital case within three weeks of the verdict. If the appeal was unsuccessful a revised execution date was set not less than 14 days or more than 18 days after the day when the appeal was dismissed, in order for the Secretary of State to consider the judgement and to make such other inquiries as were appropriate to inform his decision as to whether the death sentence should be carried out or commuted.

The Royal Commission reported that the average delay in 1950 was six weeks (if there was an appeal) and three weeks if there was not. It considered the possibility of reducing this time even further "to shorten the strain on the prisoner and those about him," but felt that the existing time periods were more than were necessary to enable proper preparations of an appeal and a reprieve petition (Report, paras 752, 755, 763). Any capital case appeal in the House of Lords was expedited, and it was usual for their Lordships to announce any rejection of the appeal at the close of argument and prior to giving reasons, in order to allow the

law to take its course. (By way of example, William Joyce was convicted on 19th September 1945; his appeal was dismissed on the 7th November 1945; their Lordships announced their decision at the conclusion of argument on 18th December, and Joyce was executed before reasons were delivered in February 1946. See Joyce v DPP (1946) AC 347 at 363-64.

The "right" which a condemned prisoner had prior to Independence in Jamaica (1962) was to have his fate decided swiftly. That right could have been asserted by application to the Court of Appeal on the event that hearing of his appeal was being unduly delayed or by prerogative writ in the event that the timetable laid down by the Governor in relation to applications to the Judicial Committee of the Privy Council was being frustrated (*e.g.* by the Registrar of the Supreme Court refusing to supply the "necessary papers"). Mandamus would lie against a prison governor who delayed in carrying out the sentence or against the executive (*e.g.* for failure to appoint a hangman). That there came a point, after inordinate delay, at which a colonial court could order that the death sentence should not be carried out was recognized by the Federal Court of India in Piare Dusadh v. King Emperor (1944) Federal Court Reports 61:

> "It is true that death sentences were imposed in these cases several months ago, that the appellants have been lying ever since under the threat of execution, and that the long delay has been caused very largely by the time taken in proceedings over legal points in respect of the constitution of the courts before which they were tried and of the validity of the sentences themselves. We do not doubt that this court has power, where there has been inordinate delay in executing death sentences in cases which came before it, to allow the appeal in so far as the death sentence

> is concerned and substitute a sentence of transportation for life on the account of the time factor alone, however right the death sentence was at the time when it was originally imposed."

To allow a death sentence lawfully passed to be transformed, by prolonged inaction, into a double sentence (12 years' imprisonment, and then death) would have been regarded as an abuse of the courts on the principles adumbrated in Connelly v DPP (1964) AC 1254.

In 1962, under Jamaica law as "under English law, a convicted prisoner, in spite of his imprisonment, retains all Civil rights which are not taken away expressly or by necessary implication" (Raymond v Honey (1983) AC 1). While condemned men were subject to a more strict regime than other prisoners, devised as that most appropriate to what was assumed to be their imminent death, they did not otherwise forfeit the protection of the common Law and the Bill of Rights (see Conjwayo v Minister of Justice (1992) 2 SA 56, in which the Zimbabwe Supreme Court so held in deciding that restricted exercise periods for prisoners under sentence of death infringed their rights to humane treatment, notwithstanding security considerations). Prisoners under sentence of death could not be assaulted, or starved or psychologically manipulated, or denied access to the Courts. They enjoyed, *de facto*, the right to have their fate promptly determined, as the result of a settled practice by the judiciary and the executive to decide appeals and mercy petitions as quickly as proper deliberation would allow.

This practice was itself a recognition of the fundamental right of the condemned prisoner not to be subjected to anguish for longer than was necessary for final determination of his conviction by the Appeal Court and his sentence by the executive.

3. EUROPEAN JURISPRUDENCE

> "... No one shall be subjected to torture or to inhuman or degrading treatment or punishment..."
>
> Article 3, *European Convention on Human Rights*

The leading European authority on what amounts to "inhuman and degrading treatment" in execution of capital sentences is Soering v United Kingdom (1989) 11 EHRR 439, which applied that description to the practice in the State of Virginia of holding condemned men on death row for 6-8 years, a delay "primarily due to a strategy by convicted prisoners to prolong the appeal proceedings as much as possible" (para 56). The European Commission on Human Rights ruled:

(i) The prohibition is absolute, and enshrines a fundamental value of democratic society now generally recognized as an internationally accepted standard (para 88).

(ii) Treatment is "inhuman" if it causes, not bodily injury, but premeditated prolonged and intense physical *or* mental suffering; and "degrading" if it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. In relation to court-ordered punishment, the severity must cause more than the inevitable element of suffering and humiliation, and in this connection account must be taken where there is considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted upon him (para 100).

(iii) The death sentence may infringe Article 3 by way of the manner in which it is carried into execution in the circumstances of a particular case. Factors to be assessed include (para 108):

(a) Length of delay; although of the prisoner's own making, in using a well-intentioned complex of post-sentence procedures,"the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death";

(b) Conditions on death row, notably the extra security for condemned men and the "seventy of a special regime" lasting for a protracted period;

(c) The applicant's age and mental state (Soering was aged 18 at the time of the offence).

(iv) "Having regard to the very long period of time spent on death row in such extreme conditions, with the ever-present and mounting anguish of awaiting execution of the death penalty and to the personal circumstances of the applicant" the court concluded that there was a real risk that his treatment would go beyond the severity threshold set by Article 3.

Applying the Soering approach, it becomes apparent that there are, in the instant case, additional factors which have made the Clarence Lackey's treatment inhuman and degrading, notably:

(v) the intense anguish and evident disorientation on three occasions after being informed of a date for

execution;

(vi) being subjected to a prison regime which, *inter alia*, denied them the opportunity for work within the prison, and association with uncondemned prisoners.

These factors, brought into fair balance against the demands of the general interest of the community, establish that the Petitioner's rights to humane treatment have been and continue to be breached.

The torturous "death row phenomenon" recognized by Soering and Pratt & Morgan has been recognized by other courts. In Thomas & Paul v. Trinidad (9 July 1987, unreported), Davis, J., ordered that a sentence of death passed upon the applicants more than 10 years before should be vacated, and that they should be removed from the death cells in the Royal Gaol and treated as persons sentenced to life imprisonment. He was satisfied that:

> "when a mandatory death penalty was provided for long before Independence and the legal complexities which our Constitution introduced, it was never in the contemplation of our lawmakers that a decade, or anything like it, would legally elapse between the passing of a sentence and the execution of the culprit."

The other factors he took into account included the conditions on death row devised on the assumption of speedy execution (the cells "were Intended to be in effect holding-bays where the condemned prisoner was kept for a limited period of time on his way to the gallows"); judicial delays (one judge had taken three years to deliver judgment); the circumstances attendant upon the reading of the execution

warrant, the fact that "a life sentence, in practice, normally means imprisonment for less than 10 years and the applicants have already been incarcerated more than this"; and concluded that "their prolonged incarceration in death row, coupled with the way in which they are treated, amounts to the infliction of cruel and unusual punishment upon them" (transcript, p. 46).

The United States Supreme Court has not pronounced on delayed executions since Furman v Georgia 33 LED 2d 346 (Justice Brennan p 377, 380; Justice Stewart p 390; Justice Marshall, p 394), although Soering has been described in one recent Federal Court case as "an important precedent ... It reflects a persuasive though non-binding international standard." Ahmad v Wigan, 726 F Supp 389 at 414 [E.D. New York].

Soering, much like Pratt & Morgan, focuses upon the consequences of systematic delay, rather than upon the good intentions of the system which allows it or the presumed "wish" of the condemned man (who is hardly in a position to choose freely) to stay alive even if he deploys litigation strategies to do so. It is submitted that the Soering approach is correct. What is overlooked in "blaming" the death row inmate by holding him responsible for appellate delays is that he is doing more than exercising his constitutional or statutory rights to appeal. He should not, in principle, suffer loss or diminution of another of his rights as a consequence. Irrespective of the reasons why appellate procedures are operating slowly, once the point is reached at which the prisoner's suffering exceeds the severity threshold set by the Eighth Amendment his right under that section is infringed.

It is accepted that a condemned prisoner may act so as to waive reliance on a particular period of delay. An obvious example is any time lapse caused by his escape and

recapture, and the conduct of his lawyers (*e.g.* requesting adjournments when the court is ready to proceed, or bringing frivolous corollary proceedings) may similarly require the delay caused by these actions to be discounted. But the duty to minimise the trauma suffered by a prisoner under sentence of death extends to all agents of the State: courts, prison officials, and the like. A collective failure on their part, or a failure by one agency in the system (*e.g.*, by an appellate court which takes cumulatively 14 years to deliver a final judgment) may be sufficient to prolong the delay to the point where it subjects the prisoner to a constitutionally improper degree of suffering. The approach of the Indian Supreme Court to delays in capital cases caused by its own procedures is instructive:

> "(Capital) cases are dealt with speedily by High Courts and are never kept pending longer than two or three months. It is only when they reach this court that the delay occurs. But surely, our inability to devise a procedure to deal expeditiously with such matters of life and death can be no justification for silencing what the Learned Chief Justice has himself so eloquently described as 'the voice of justice and fair play' which demands that so long as life lasts, so long, shall it be the duty and endeavor of this Court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation."

Javed Hamed Pawala v State of Maharashtra
(1985) 2 SCR 8.

4. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

On 8th June, 1992, the Secretary General of the

United Nations received the Instrument of Ratification from the United States Senate of the International Covenant on Civil and Political Rights. The United States was thus bound in international law to ensure that sentence of death is carried out only in accordance with the law and not contrary to the provisions of the Covenant; procedural guarantees therein prescribed must be observed, including the right to a fair hearing, the presumption of innocence, the minimum guarantees for the defense, communication with counsel of his own choosing, trial without undue delay and the right to review by a higher tribunal. The Human Rights Committee of the United Nations has repeatedly ruled that in capital punishment cases, the duty of States is to observe rigorously all the guarantees for a fair trial set out in the Covenant.

The United States Senate made a number of reservations upon ratification, primarily concerning the continued practice of executing minors at the date of their conviction. International law recognises the right of parties to a multilateral treaty to formulate objections to reservations; by early January, 1994 the following countries had deposited with the United Nations objections to the United States' reservations, declarations and understandings:

(a) Finland
(b) Netherlands
(c) Germany
(d) Denmark
(e) France
(f) Norway
(g) Belgium
(h) Italy
(i) Portugal
(j) Spain

International jurisprudence tends to the view that the United States reservations to the death penalty provisions of

the International Covenant are illegal, as they are contrary to the object and purpose of the Treaty. Examining the matter narrowly, it would appear that the United States does not intend to be bound by Articles 6 and 7 of the Covenant so far as the death penalty is concerned.

Article 6 of the International Covenant provides:

"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

Article 7 of the International Covenant provides:

" No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

However, the objecting countries have quite correctly stated that under Article 4(2) there can be no derogation from Articles 6 and 7. It is likely therefore that one of the objecting countries will seek a ruling from the Human Rights Committee of the United Nations as to the effect and legality of the reservations.

CONCLUSION

WHEREFORE, the English Bar Committee of Human Rights urges this Court to grant our motion for leave to file this *amicus curiae* brief and ultimately grant Clarence Allen Lackey's petition for writ of certiorari in order to resolve these important issues of law.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

CLARENCE ALLEN LACKEY *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 94–8262. Decided March 27, 1995

The petition for a writ of certiorari is denied.

Memorandum of JUSTICE STEVENS respecting the denial of certiorari.

Petitioner raises the question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment. Though the importance and novelty of the question presented by this certiorari petition are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts. See, *e. g.*, *McCray* v. *New York*, 461 U. S. 961 (1983) (STEVENS, J., respecting denial of certiorari).

Though novel, petitioner's claim is not without foundation. In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, see *id.*, at 177 (opinion of Stewart, Powell, and STEVENS, JJ.), and (2) the death penalty might serve "two principal social purposes: retribution and deterrence," *id.*, at 183.

It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended

time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U. S. 160, 172 (1890). If the Court accurately described the effect of uncertainty in *Medley*, which involved a period of four weeks, see *ibid.*, that description should apply with even greater force in the case of delays that last for many years.* Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal. See, *e. g.*, *Coleman* v. *Balkcom*, 451 U. S. 949, 952 (1981) (STEVENS, J., respecting denial of certiorari) ("the deterrent value of incarceration during that period of uncertainty may well

*See also *People* v. *Anderson*, 6 Cal. 3d 628, 649, 493 P. 2d 880, 894 (1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture") (footnote omitted); *Furman* v. *Georgia*, 408 U. S. 238, 288–289 (1972) (Brennan, J., concurring) ("[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"); *Solesbee* v. *Balkcom*, 339 U. S. 9, 14 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"); *Suffolk County District Attorney* v. *Watson*, 381 Mass. 648, 673, 411 N. E. 2d 1274, 1287 (1980) (Braucher, J. concurring) (death penalty is unconstitutional under state constitution in part because "[i]t will be carried out only after agonizing months and years of uncertainty"); *id.*, at 675–686, 411 N. E. 2d, at 1289–1295 (Liacos, J., concurring).

be comparable to the consequences of the ultimate step itself"). As Justice White noted, when the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman* v. *Georgia*, 408 U. S. 238, 312 (1972) (opinion concurring in judgment); see also *Gregg* v. *Georgia*, 428 U. S., at 183 ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering").

Petitioner's argument draws further strength from conclusions by English jurists that "execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689." *Riley* v. *Attorney General of Jamaica*, [1983] 1 A. C. 719, 734, 3 All E. R. 469, 478 (P. C. 1983) (Lord Scarman, dissenting, joined by Lord Brightman). As we have previously recognized, that section is undoubtedly the precursor of our own Eighth Amendment. See, *e.g.*, *Gregg* v. *Georgia*, 428 U. S., at 169–170; *Harmelin* v. *Michigan*, 501 U. S. 957, 966 (1991) (SCALIA, J., concurring in judgment).

Finally, as petitioner notes, the highest courts in other countries have found arguments such as petitioner's to be persuasive. See *Pratt* v. *Attorney General of Jamaica*, [1994] 2 A.C. 1, 4 All E. R. 769 (P. C. 1993) (en banc); *id.*, at 32–33, 4 All E. R., at 785-786 (collecting cases).

Closely related to the basic question presented by the petition is a question concerning the portion of the 17-year delay that should be considered in the analysis. There may well be constitutional significance to the reasons for the various delays that have occurred in petitioner's case. It may be appropriate to distinguish, for example, among delays resulting from (a) a peti-

tioner's abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the State. Thus, though English cases indicate that the prisoner should not be held responsible for delays occurring in the latter two categories, see *id.*, at 33, 4 All E. R., at 786, it is at least arguable that some portion of the time that has elapsed since this petitioner was first sentenced to death in 1978 should be excluded from the calculus.

As I have pointed out on past occasions, the Court's denial of certiorari does not constitute a ruling on the merits. See, *e. g.*, *Tennessee* v. *Barber*, 513 U. S. __ (1995); *Singleton* v. *Commissioner*, 439 U. S. 940, 942 (1978) (STEVENS, J., respecting denial of certiorari). Often, a denial of certiorari on a novel issue will permit the state and federal courts to "serve as laboratories in which the issue receives further study before it is addressed by this Court." *McCray* v. *New York*, 461 U. S., at 963. Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study.

JUSTICE BREYER agrees with JUSTICE STEVENS that the issue is an important undecided one.